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ADMISSIBILITY OF LIFE OR MORTALITY TABLES IN EVIDENCE IN CASES OF DEATH OR PERMANENT INJURY, FOR THE PURPOSE OF ESTIMATING THE AMOUNT OF DAMAGES.

If there were any sentiment in the law the last vestige of it is fast disappearing under the materialistic tendencies of the present age. In no respect is this result more strikingly apparent than in the rules laid down for the assessment of damages in cases of personal injury. With the one possible exception of an action for breach of a promise of marriage, where the damages seem to be purely sentiment, all rules regulating the compensation or assessment of damages in cases of personal injuries attempt to approximate the actual damages with as much mathematical precision as is possible.

With a knowledge of the extent to which this tendency has received the approval of the courts, we are inclined to disapprove of the court's indecision on the admissibility of mortality tables in evidence, in cases of death or permanent injury, in the recent case of Norfolk & W. R. R. v. Phillips' Admr., 41 S. E. Rep. 726. In this case the Supreme Court of Virginia held that it was not essential to prove the expectation of life of a decedent by mortality tables. This was an action for the wrongful death of plaintiff's decedent. Plaintiff's fourth instruction, to which the defendant objected, relating to the measure of damages if the jury found a verdict for the plaintiff, among other directions, to which no objection is made, told the jury that they might take into consideration the pecuniary loss of the widow and her children, "estimated upon the probable earnings of the deceased, considering his age, business capacity, experience, habits, energy, and perseverance during his probable life." The objection urged to this direction was that there was no evidence as to the probable earnings of the deceased, his capacity, experience, energy, and perseverance, nor proof of his wages or of mortality tables. The appellate court, while not satisfied with the accuracy of the rule for the assessment of damages laid down by the trial court, refused to say that the damages should be based on the probability of life as computed by the mortality tables. The court said: "The evidence is that deceased was 38 years of age, had been for some time in the employ of the defendant as a section hand, and that his wages were sufficient to support a wife and eight children. With this evidence, and the further fact that the verdict, under the circumstances of the case, does not indicate that the jury were unreasonable in their estimate of damages, we do not think that the giving of the instruction is to be regarded as reversible error; but as the case has, for other errors, to go back for a new trial, it would be better for the plaintiff to offer evidence more direct as to the probable earnings of the deceased, considering his age, business capacity, experience, habits, energy, and perseverance, etc. We do not, however, regard it as essential that the mortality tables be proven in the case. These tables were made for the purpose of life insurance and annuties, where the very shortest time is fixed as affecting pecuniary risks. They are regarded as failing short, in most instances, of the actual duration of human life." Citing Mulcairns v. City of Janesville, 67 Wis. 37, 29 N. W. Rep. 565.

The latest authorities do not seem to sustain the decision in this case. The rule is, to admit, in all cases of personal injury, evidence as to the probability of life as based on the mortality or annuity tables because of the added certainty which they give to the accurateness of the damages assessed by the jury. The latter go into the jury room with their minds excited by the appeals of counsel and with very loose notions as to a proper measure of damages. A little effort expended in computing the damages on some mathematical basis serves to cool the ardor of those of the jury who, in their excitement, favor the assessment of plaintiff's damages at some large, extravagant figure, more out of a spirit of enmity against the defendant than from an honest endeavor to compensate the plaintiff for his injuries. The wisdom of admitting the mortality tables in evidence in this class of cases is, for this reason, appealing very strongly to the courts. Such evidence tends also to discourage quotient or "chance" verdicts by giving the jury something to figure on. It also inclines that large class of citizens, who sometimes find their way

into the jury box and who admit of being prejudiced against personal injury suits because of the loose and vindictive manner in which damages are generally assessed, to favor a reasonable verdict which attempts accurately to compensate the plaintiff without unjustly robbing the defendant.

Of course proof of the expectancy of life is of no value in actions for personal injuries, where such injuries are not permanent; for which reason the mortality tables are not admissible in such cases. Matt v. Railroad (Mich. 1899), 79 N. W. Rep. 3; City of Honey Grove v. Lamaster (Tex. 1899), 50 S. W. Rep. 1053; Leach v. Railroad (Mich. 1900), 84 N. W. Rep. 316. But in cases where the injury is permanent, life expectancy tables are very properly admitted. Collins Park, etc. R. R. v. Ware, 112 Ga. 663, 37 S. E. Rep. 975; Stomne v. Produce Co. (Iowa 1899), 78 N. W. Rep. 841; M., K. & T. R. R. v. St. Clair (Tex. 1899), 51 S. W. Rep. 666; City of Huntington v. Burke (Ind. 1898), 52 N. E. Rep. 415; City of Indianapolis v. Marold, 25 Ind. App. 428, 58 N. E. Rep. 512; Allen v. Railroad (Iowa, 1899), 76 N. W. Rep. 848. And such being the rule in cases of permanent injuries, there could seem to be no reason for refusing to apply it in cases of death by wrongful act, and the authorities refuse to make any distinction between the two classes of actions, holding that the mortality tables are admissible in evidence to show the expectancy of life of a deceased person, killed by the wrongful act of the defendant, and to admeasure the pecuniary loss to his widow or next of kin resulting from his death. City of Friend v. Burleigh, 53 Neb. 674, 74 N. W. Rep. 50; Sweet v. Railroad (R. I. 1890), 40 Atl. Rep. 237; Galveston, etc. R. R. v. Burnett (Tex. 1897), 42 S. W. Rep. 314.

In Wisconsin the court sets a reasonable limit upon this rule. In the case of Crouse v. Railroad, 78 N. W. Rep. 446, that court held that, in determining the damages for injuries causing a total permanent disability, the annuity tables may be considered in connection with all other evidence on that issue, but that they cannot be made the mathematical basis for estimating such damages. In other words, this case simply holds that a trial court cannot limit a jury to a mere mathematical solution of the question based on the mortality tables; other considerations in individual cases may either prolong or reduce the average expectancy of life as fixed by such tables, and such considerations the jury should take into account in arriving at an accurate estimate of the damages. With this limitation life tables can be admitted in any case with entire safety. Thus in an action for negligence in causing the death of a husband and father, life expectancy tables were held to be admissible, notwithstanding the decedent was engaged in the peculiarly hazardous occupation of a railroad engineer, and although the evidence showed that the tables only applied to persons in the ordinary walks of life, since the tables afforded the jury some guide as to the probable duration of decedent's life had the accident not occurred. Galveston, etc. R. R. v. Johnson (Tex. Civ. App. 1900), 622.

NOTES OF IMPORTANT DECISIONS.

TROVER — DISCHARGE IN BANKRUPTCY AS A DEFENSE.—A discharge in bankruptcy is not a cure for all the financial ills man is heir to. It does not permit him to convert another man's property and then seek to have his title confirmed by a discharge in a court of bankruptcy. In this connection the recent case of Berry v. Jackson, 41 S. E. Rep. 698, is interesting. This was an action of trover to recover the possession of a horse. The defendant sought to set up in defense to the plaintiff's action a discharge in bankruptcy granted to him while the trover suit was pending. The trial court refused to admit the defense. Justice Lumpkin, speaking for the Supreme Court of Georgia in sustaining the action of the trial court, said:

"We have no hesitancy in deciding that the rulings of the court below were correct. The sole issue in the trial of an action of trover is that of title to the property in dispute, and the fact that the plaintiff may elect to take a money verdict in lieu of the specific personalty claimed can in no event alter that issue. Campbell v. Trunnell, 67 Ga. 518. Counsel for the plaintiff in error proceeds in his brief upon the assumption that the action was based upon a debt owed by Berry to Jackson, and argues that as such it was a claim from which he was relieved by his discharge in bankruptcy. But no such facts appear in the record. All that we have before us is an action of trover for the recovery of specific personal property, and, regardless of the election of the plaintiff to take a money verdict, the title to the property in dispute, which was the only issue for determination, could not be affected by any bankruptcy proceedings in which the defendant may have participated, especially as it nowhere ap-

pears, either in the special plea or the amendment to the original plea, that such proceedings were ever brought to the notice of the plaintiff."

TRIAL AND PROCEDURE — PREJUDICIAL REMARKS OF TRIAL JUDGE BEFORE JURY IS IMPANELED. — Lawyers and judges are not always made out of the same block. Some lawyers could never be judges because of their insatiable desire to be in the fight. The "smell of powder" overcomes any judicial poise which they may attempt to assume and constrains them to plunge into the fray, doing and saying things unbecoming a judge and prejudical to the interests of the parties before them. Even the federal bench is not free from this class of intermeddling jurists. Thus in the recent case of Allen v. United States, 115 Fed. Rep. 3, the defendant in a criminal case filed a motion for continuance on the ground of the absence of a witness, supported by the affidavits of himself and his counsel setting out the facts to which the witness would testify if present. The district attorney refused to admit that the witness would so testify on the ground that the wife of the witness had told him that defendant's attorney had tried to get her husband to give such testimony, but that the same was not true. This statement by the district attorney was corroborated by the presiding judge of the district court as a matter of personal knowledge, the remarks of both being made in open court in the presence of the jurors, and the continuance was denied. Subsequently the court refused to permit defendant's counsel to renew his motion, or to read an affidavit made by the wife of the absent witness in which she denied having made the statement attributed to her, and deposed that her husband had told her that the facts were as set out in the affidavits of defendant and his counsel. On appeal the circuit court of appeals held that the remarks of the court, reflecting, as they did, upon both defendant and his attorney, and going to the jurors unchallenged, were calculated to unduly prejudice them against defendant, and to prevent him from having a fair and impartial trial, and constituted reversible error.

The point was very strongly urged in this case that the remarks of the court were made before the jury was impaneled, and therefore could not be said to be in the presence of the jury. In answer to this contention the court said: "This makes no difference. They were made in the presence of all the jurors. It matters not, therefore, whether they were in the jury box or outside the railing of the court room. There is no pretense that the jurors present did not hear the remarks. The chair or bench upon which they were seated does not control the question. The remarks of the court, if erroneous, had the same effect as an erroneous instruction given to the jury regularly impaneled." This decision is in line with the latest authorities. Bowman v. State, 19 Neb. 523, 28 N. W. Rep. 1, 53 Am. Rep. 750; People v. Bonds, 1 Nev. 33; Sullivan v. People, 31 Mich. 1; State v. Philpot, 97 Iowa, 366, 66 N. W. Rep. 730. In Bowman v. State, *supra*, where an application for a continuance was made before the trial, the jurors being present in court who afterwards sat upon the case, the presiding judge remarked that "said affidavit was false; that defendant's father had told him that he would have nothing to do with him, the defendant; that the defendant had committed perjury; and that a grand jury would be called to investigate the same on the 22d day of the following month." On appeal the court held the language of the trial court clearly prejudicial, saying, among other things: "It is of first importance that each juryman should enter the box as near as possible free of previously acquired knowledge, or of that which he believes to be, but which may or may not be, knowledge of the facts of the case. Also as free as possible of either knowledge or opinions of collateral facts calculated to either stimulate or retard the mind in the reception of either evidence or argument favorable to one party or the other to the controversy. * * * It may be granted that such declaration or expression of the court did not cause the future juror to form or express an opinion as to the guilt or innocence of the accused, but it did prevent him entering the box with his mind *a tabula rasa*, so far as the guilt or innocence of the prisoner was concerned."

SCHOOLS AND SCHOOL DISTRICTS—DISCRIMINATION AGAINST CHILDREN OF AFRICAN DESCENT.—What is known as the "race problem" is not confined to the southland. It sometimes appears in the north, generally in regard to the right to separate the black and white races in hotels, public conveyances and schools. In this last regard the recent case of People v. Mayor, 61 N. E. Rep. 1077, is interesting. In that case the Supreme Court of Illinois held, one justice dissenting, that where children of African descent, who had formerly attended a certain school, which was near their residence and attended by white and colored children alike, were excluded therefrom immediately upon the establishment of schools exclusively for colored children, and required to attend the latter, no reason for such exclusion other than their color being alleged, a finding that such children had not been discriminated against, or excluded from the most convenient school, on account of their color, was contrary to the evidence.

This decision is supported by other authorities in Illinois and in other states. Chase v. Stephenson, 71 Ill. 383; Clark v. Board, 24 Iowa, 266; People v. Board, 18 Mich. 399; Wysinger v. Brookshank, 82 Cal. 588; People v. City of Alton, 179 Ill. 632. In this last citation the court said: "It may be that the wisest of both races believe that the best interests of each would be promoted by voluntary separation in the public schools, and while such voluntary action, not in violation of law, could not be interferred with by the courts, yet the law is too plain for argument, and has often been decided, that no child otherwise entitled to

attend any public school in this state can, on account of the color of such child, be excluded, directly or indirectly, from such school by any school officer or public authorities." On the other side from these states are those of Alabama, Missouri, Georgia, North Carolina, West Virginia, Tennessee and Texas where by constitutional prohibition white and colored children can under no circumstances be taught in the same public school. In other states with no such constitutional prohibitions it is held that there is no discrimination in separating the races so long as substantially equal school advantages are given to one as to the other. Cory v. Carter, 48 Ind. 327; Bertonneau v. Board, 3 Woods (U. S.), 177; Maddox v. Neal, 45 Ark. 121, 55 Am. Rep. 540; State v. McCann, 21 Ohio St. 211; State v. Gray, 93 Ind. 303; Dallas v. Fosdick, 40 How. Pr. (N. Y.) 249. This last case was an action for damages brought by a colored pupil who had been evicted from the white school. Separate schools exclusively for white and colored pupils had been established, and it was held that she could not recover. The court said: "The right to be educated in the common schools of the state is one derived entirely from the legislation of the state; and as such, it has at all times been subject to such restrictions and qualifications as the legislature have from time to time deemed it proper to impose upon its enjoyment."

PRIVATE NUISANCES — PRECIPITATION OF SNOW AND ICE UPON ADJOINING PROPERTY.— The old maxim that every man must so enjoy that which belongs to him so as not to injure another is well illustrated by the recent case of Davis v. Niagara Falls Tower Co., 64 N. E. Rep. 4. The question presented was one of private nuisance. Defendant erected a high tower on a building in the vicinity of a large cataract. During the winter ice from the spray of the cataract accumulated on the framework, and fell on an adjacent building, whenever a thaw happened, in such large quantities as to endanger human life and injure the building. The tower was several feet within the limits of the lot on which it was situated, and was a substantial structure, and suited for the purposes for which it was erected. The New York Supreme Court, however, held it to constitute a private nuisance, entitling the owner of the adjacent building to a perpetual injunction restraining its maintenance in such a condition that ice could form thereon and fall onto the adjacent property.

In support of its position in this case the court said: "The plaintiff's right to recover depends on the duty that the defendant owed to adjacent owners with reference to ice that might accumulate on its building. The law with reference to rainfall seems well settled. So long as the owner of land leaves it in its natural condition, he is not required to adopt any measures to prevent the flowage of surface waters from his premises on the adjoining land (Vanderwiele v. Taylor, 65 N. Y. 341), but when he puts a structure on the land a contrary rule prevails. Then he must take care of the water that falls on his premises, except in the case of extraordinary storms. In Washb. Easem. p. 390, it is said of the right to eaves' drip: 'It grows out of the fact that for one to construct the roof of his house in such manner as to discharge the water falling thereon in rain upon the land of an adjacent proprietor is a violation of the right of such proprietor, if done without his consent, and this consent must be evidenced by express grant or prescription.' It is to be observed that the structure of the tower is not on the division line between the land of the plaintiffs and that of the defendant, and, therefore, the ice that is formed on the posts, beams, and girders is accumulated wholly on the defendant's land. If the shape of the tower was such that rain falling on the defendant's premises would run down the posts and then be cast on plaintiff's building, plainly, under the authorities cited, the defendant would be liable. It can make no difference on the question of the defendant's liability that the water, instead of being precipitated on the plaintiffs' land, is allowed to congeal and freeze and fall in the form of ice. Nor is it material on the question of liability whether the ice proceeds from the fall of rain or from the spray and mist of Niagara Falls. The latter is just as much a natural phenomenon as the former. In climates where at certain seasons of the year the rain falls in the form of snow, the owner of land must build his structures with guards that would be unnecessary in places where there is no fall of snow. Likewise, where a structure is built so near Niagara Falls as to be subject to the precipitation thereon of spray and water from the falls, the owner is bound to take the necessary precautions against casting the water which falls on his own premises or the ice that is formed therefrom upon those of his neighbor."

While this seems rather a hard case it is well within the rule announced by the weight of authority. Thus, in Shipley v. Fifty Associates, 106 Mass. 194, 8 Am. Rep. 318, it was held that maintaining a building with a roof constructed so that snow and ice collecting on it from natural causes will probably fall onto an adjoining highway renders the owner liable to a person injured. It was there said: "It is not at all a question of reasonable care and diligence in the management of his roof, and it would be of no avail to the party to show that the building was of the usual construction, and that the inconvenience complained of was one which, with such a roof as his, nothing could prevent or guard against. He has no right so to construct his building that it will inevitably, at certain seasons of the year, and with more or less frequency, subject his neighbor to that kind of inconvenience; and no other proof of negligence on his part is needed. He must, at his peril, keep the ice or snow that collects upon his roof within his own limits, and is responsible for

all damages if the shape of his roof is such as to throw them upon his neighbor's land, in the same manner as he would be if he threw them there himself." To same effect: Gould v. McKenna, 86 Pa. St. 297, 27 Am. Rep. 705; Tanner v. Valentine, 75 Ill. 624; Jutte v. Hughes, 67 N. Y. 267; Hazeltine v. Edgmand, 35 Kan. 202, 10 Pac. Rep. 544, 57 Am. Rep. 157.

EXEMPLARY DAMAGES IN ACTIONS AGAINST CORPORATIONS.

As to what are exemplary damages has been the subject of vigorous controversy in this country, and the opposing positions are well summarized in Hendrickson v. Kingsbury[1] by Judge Cole, as those of Prof. Greenleaf and Mr. Sedgwick. Prof. Greenleaf's position is stated to be as follows: "While the plaintiff can only recover compensation, he is not confined to the proof of actual pecuniary loss, but the jury may take into consideration every circumstance of the act, which injuriously affected the plaintiff, not only in his property, but in his person, his peace of mind, his quiet and sense of security in the enjoyment of his rights; in short his happiness." That of Mr. Sedgwick is stated to be: "That wherever the elements of fraud, malice, gross negligence or oppression mingle in the controversy, the law instead of adhering to the system, or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitory, vindictive or exemplary damages; in other words, blends together the interest of society and the aggrieved individual, and gives damages, not only to recompense the sufferer, but to punish the offender." As to these opposing rules Justice Davis, speaking for the federal supreme court,[2] says: "Courts have chosen to place this doctrine on the ground, not that the sufferer is to be reimbursed, but that the offender is to be punished; and although some text-writers and courts have questioned its soundness, it has been accepted as the general rule in England and in most of the states of this country." Among the most notable cases questioning the rule of punishment of the offender are those of Fay v. Parker[3] and Pegram v. Storts,[4] the former challenging the production of any case at the common law allowing the two species of damages pointed out by Mr. Greenleaf, and the addition of further damages by way of punishment.

It is not the purpose of this article to attempt any review of the position of Mr. Sedgwick or that of Prof. Greenleaf. It is true, however, that many of the courts of this country do give what in Pegram v. Storts are called determinate and indeterminate damages, and add thereto the kind of damages recognized by Justice Davis as exemplary. Thus Justice Gray, speaking for the federal supreme court,[5] holds that the lower court rightly instructed, that for any wantonness in conduct causing pain in body or mind, when perpetrated in the course or scope of employment, the corporation was liable, the case being reversed, solely because, there being no proof of authorization or ratification, the court instructed that further damages might be given as punishment. The justice also tersely defines these damages as follows: "Exemplary or punitive damages are awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others." As in accord with the Greenleaf rule may be placed Michigan[6] and Massachusetts.[7]

The main conflict between the courts of this country, which this article seeks to point out, is that of *respondeat superior* in the case of a tort committed in the line or scope of duty where the tort-feasor is the agent or employee of a corporation. This question, as to a railroad corporation, at least, the federal supreme court holds to be one of general law, in the decision of which that court is uncontrolled by the state tribunals, except there be a statute expressly regulating the subject.[8] This rule of general law, however, would, if the only cases I have found is any indication, not obtain where the action is brought in the court of another state than where the liability for compensation arose, the case so holding being subsequent to the Prentice case and reviewing the cases it cites from Illinois, where the particular liability arose, and reaching a directly contrary conclusion.[9]

[1] 21 Iowa, 379.
[2] R. R. Co. v. Arms, 91 U. S. 492.
[3] 53 N. H. 342.
[4] 31 W. Va. 220.
[5] Lake Shore, etc. Ry. Co. v. Prentice, 147 U. S. 101.
[6] Lucas v. R. R. Co., 98 Mich. 1; Wilson v. Bowen, 64 Mich. 141.
[7] Hawes v. Knowles, 114 Mass. 518.
[8] Lake Shore, etc. Ry. Co. v. Prentice, *supra*.
[9] Pullman v. Lawrence, 74 Miss. 782. See also Ignue . Murphy, 10 Ala. 885; Ry. Co. v. Samar, 68 Ga. 384;

Before adverting to state cases it may be well to briefly notice what seems, and what as I will herein indicate, some of the courts must have regarded, as a conflict in the cases of the United States Supreme Court. Taking the case of R. R. Co. v. Quigley,[10] a libel case, we find that Justice Campbell, speaking for the court, makes no distinction in grade of servants as to torts committed against third persons, but puts the test simply upon whether or not the injury was inflicted in the course of business and the servant's employment, and then broadly states the rule to be that if the injury is "inflicted maliciously or wantonly, and with circumstances of contumely or indignity," exemplary damages may be allowed. As the facts were held not to evidence any of these things, the lower court was reversed in instructing upon the subject of such damages. The Arms case, *supra*, is broader than the Quigley case, in that it includes want of care along with willful misconduct, and the court, speaking by Justice Davis, summarizes as follows: "To do this (allow exemplary damages) there must have been some willful misconduct, or that entire want of care which would raise a presumption of a conscious indifference to consequences. Nothing of this kind can be imputed to the persons in charge of the train; and the court, therefore, misdirected the jury." Referring again to the Prentice case we find the court saying: "A conductor or other subordinate agent or servant of a railroad corporation is no more identified with his principal, so as to affect the latter with his own unlawful and criminal intent, than any agent or servant standing in a corresponding relation to natural persons carrying on a manufactory or mine, or a house of trade or commerce." This passage, of itself, does not necessarily show any conflict, but the case holds that, no matter whether injury is inflicted in the line of duty or not, such intent other than by a controlling officer does not fix participation on any corporation. The case concedes that there is participation to authorize the recovery of fullest compensation for injury to the body, or to the mind, by reason of wantonness, affecting the manner of the infliction of the injury, but introduces a refinement making the act wantonly inflicted a participation by the corporation on one side of a line of demarcation and on the other not. The Court of Appeals of the District of Columbia did not suspect this distinction underlying the broad language employed in the Quigley and Arms decisions, and accordingly held, that though that court did not favor the doctrine of exemplary damages against corporations, yet the rulings of its superior jurisdiction, the federal supreme court, being that when the agents of a railroad company are guilty of maliciousness or recklessness, exemplary damages might be allowed, bowed to its construction of those decisions.[11]

Taking, however, the doctrine laid down in the Prentice case as being the settled doctrine for the federal courts of this country, it is found to be, that the acts of subordinate agents and servants of a corporation, though done within the scope of their employment, are not those of the corporation, in the sense that exemplary damages may be allowed against it as punishment or as a warning, whether they are the result of fraud, malice, oppression or gross misconduct of subordinate agents, unless there has been previous authorization or subsequent ratification by the corporation itself. This doctrine, the court claims, is in harmony with the greater weight of authority, and many cases are cited from the state courts in support of its view. Among others are cases from Illinois where the cause of action arose, but it has been strongly insisted that the cases cited do not sustain such a doctrine.[12] Be that as it may, however, I note the following in a later Illinois case: "It is contested that appellant, being a corporation, cannot be made to respond in vindictive damages, unless the wrongful act was authorized or approved by the corporation. This is not in accordance with the rulings of this court. Ever since the case of R. R. Co. v. Dalby, 19 Ill. 353, it has been regarded as settled law, that if the wrongful act of the agent is perpetrated, while ostensibly discharging duties within the scope of the corporate purposes, the corporation may be liable to vindictive damages; and that a person openly and notoriously exercising the functions of a particular agency of a corporation will be pre-

Penna. Co. v. Fairchild, 69 Ill. 260; Bridges v. R. Co., 27 S. Car. 456; Forepaugh v. R. Co., 128 Pa. St. 217, 5 L. R. A. 508.

[10] 21 How. 210.

[11] Flannery v. R. Co., 4 Mack. (D. C.) 111.

[12] Pullman v. Lawrence, *supra*.

sumed to have sufficient authority from the corporation to so act.[13] Later cases appear to adhere to this principle.[14] A distinction, however, was drawn in an earlier case between an injury, which is the result of gross negligence, and one willfully or wantonly inflicted, it being necessary to show as to the former, that the corporation either knew the servant was incompetent or reckless, when it employed him, or that it retained him after ascertaining such facts, while for willfulness or wantonness the fault of the servant with its full heinousness is imputable to the corporation.[15] Also, as regards the New Jersey case cited as supporting the doctrine laid down in the Prentice case,[16] a later decision in that case state expresses doubt of the correctness of that holding, and in a libel case against a publishing company says: "If the intent is malicious the corporation must be liable therefor, as it is for other tortious acts of its agents done within the scope of their authority, and for the purposes for which the corporation was created and it agents were employed," and exemplary damages might be allowed "sufficient to rebuke the malicious and reckless wrongdoer and vindicate character.[17]

The courts of the states cited to the note here appended appear to be in full accord with the Prentice case.[18] While the courts of the states named in the note next following are either opposed to the authority and ratification doctrine altogether, or are in favor of allowing exemplary damages only where the act of the agent was wanton or willful, and not where the injury was the result of gross negligence.[19] In some states the ruling is upon statutory construction, but they are rather deemed to fall in the category of those states not following or approving the authority and ratification doctrine,[20] as the reasoning is upon a theory of a predilection of the courts to this view. In a number of cases it appears that in this country the weight of authority is opposed to the authority and ratification doctrine, the statement to the contrary, which is made in the Prentice case, notwithstanding.

Evidence of Authorization and Ratification.—What is necessary to show previous authority or ratification and adoption is more or less variously ruled in the courts holding to the necessity of one or the other. It may hardly be expected that there will be found any case of previous authority to commit a tort, save as the result of a system or course of action. Thus of a conductor obeying directions not to stop a train, where cars were overloaded, the failure of the railroad by the use of reasonable diligence to supply sufficient transportation made it liable for exemplary damages,[21] or where there is failure to establish regulations that will prohibit or prevent wantonness by servants.[22] Want of antecedent caution in selection of servants is tantamount to previous authorization,[23] or employment of one with known bad habits or addicted to drunkenness,[24] the statement of the rule in the last two cases being expressly approved in the Prentice case,

[13] Singer Mfg. Co. v. Holdfodt, 86 Ill. 455.

[14] Wabash, etc. Ry. Co. v. Rector, 104 *Id.* 296; R. R. Co. v. Morrison, etc. Co., 160 *Id.* 288.

[15] I. C. R. R. Co. v. Hammer, 72 Ill. 347.

[16] Haines v. Schultz, 50 N. J. L. (21 Va.) 481.

[17] Hoboken, etc. Co. v. Kahn, 59 N. J. L. 218.

[18] New York: Clegborn v. R. R. Co., 56 N. Y. 47. Oregon: Sullivan v. Ry. Co., 12 Oreg. 392. Rhode Island: Hagan v. R. Co., 3 R. I. 88. Texas: Dillingham v. Anthony, 73 Tex. 147, 3 L. R. A. 634. Virginia: Norfolk, etc. Co. v. Lipscomb, 90 Va. 137, 20 L. R. A. 817. West Virginia: Talbott v. Ry. Co., 42 W. Va. 560. Wisconsin: Robinson v. R. R. Co. (Wis.), 34 L. R. A. 205.

[19] Arkansas: Ry. Co. v. Davis, 56 Ark. 48; Gas, etc. Co. v. Orr, 59 *Id.* 215. Connecticut: Dalton v. Beers, 38 Conn. 529. Kansas: W. & W. Mfg. Co. v. Boyce, 36 Kan. 450; Ry. Co. v. Rice, 28 *Id.* 398; West v. Telegraph Co., 39 *Id.* 93. Indiana: St. Ry. Co. v. Willoeby, 134 Ind. 563. Illinois: Cases *supra.* Iowa: Ellsworth v. R. Co., 29 L. R. A. 173; Curl v. Ry. Co., 63 Iowa, 417. Kentucky: Packet Co. v. Vogel, 97 Ky. 9; L. & N. R. R. Co. v. Ballard, 85 Ky. 307; Jacob's Admr. v. L. & N. R. R. Co., 10 Bush, 263; Ry. Co. v. Dodge, 66 S. W. Rep. 606. Maine: Goddard v. R. R. Co., 57 Me. 84. Maryland: R. Co. v. Blocher, 27 Md. 277; R. R. Co. v. Larkin, 47 Md. 155; R. R. Co. v. Hoeflich, 62 *Id.* 300; R. Co. v. Barger, 80 Md. 23. Mississippi: R. Co. v. Bailey, 50 Miss. 393; South. Express Co. v. Brown, 67 Miss. 260. Missouri: Hoehl v. Ry. Co., 119 Mo. 340; Canfield v. Ry. Co., 59 Mo. App. 354. Nevada: Quigley v. R. Co., 11 Nev. 364. North Carolina: Purcell v. R. Co., 108 N. Car. 414, 12 L. R. A. 113. Ohio: R. Co. v. Dunn, 19 Ohio St. 162; R. Co. v. Cole, 29 *Id.* 126. Pennsylvania: Phila. Trac. Co. v. Orbaun, 119 Pa. St. 37; Ry. Co. v. Rozenweig, 113 *Id.* 519. South Carolina: Quinn v. Ry. Co., 29 S. Car. 381; Hart v. R. Co., 33 *Id.* 427, 12 S. E. Rep. 39; Watts v. R. Co., 60 S. Car. 74, 38 S. E. Rep. 242. Tennessee: R. Co. v. Poston, 94 Tenn. 696; Traction Co. v. Lane, 46 L. R. A. 549.

[20] Alabama: R. Co. v. Freeman, 97 Ala. 289; R. Co. v. Phillips, 98 *Id.* 159. California: Gorman v. R. Co., 97 Cal. 1. Colorado: 22 Colo. 113. Georgia: Gasway v. R. Co., 88 Ga. 216; Head v. R. Co., 79 *Id.* 360.

[21] Purcell v. R. Co., 108 N. Car. 414, 12 L. R. A. 113.

[22] Dillingham v. Anthony, *supra;* Ry. Co. v. Garcia, 70 Tex. 207.

[23] Hagan v. Ry. Co., 3 R. I. 88.

[24] Cleghorn v. Ry. Co., *supra.*

supra, Moreover, just as recklesss employment has the effect of authorization, so continuance in employment after discovery of servant's recklessness.[25]

As to proof of ratification it was held in Missouri, before, in the evolution of decided cases, the supreme court of that state had arrived at the conclusion that authority and ratification were not required,[26] that slight acts were sufficient such as retention of the employee.[27] In Texas retention of the servant inflicting the injury was thought to be of little or no value to establish ratification, as such might be without reference to, or connection with, the tortious act complained of.[28] In Wisconsin it was thought to tend to prove ratification.[29]

Vice-Principals and Superior Servants.—Many cases, otherwise in harmony with the Prentice case, are not in full accord on the point of subordinate agents or employees and hold that certain employees, because of the discretion vested in them and the lack of immediate supervision over their acts, represent and stand for the corporation itself.[30] Thus in Massachusetts it is said that the conductor of a railroad train, from the necessity of the case, represents the corporation in the specific duties he is to perform and as to the control vested in him, and his willful misconduct is imputable to the corporation.[31] In Minnesota the agent at a telegraph station was held to be a vice-principal, so as to make his act in receiving and transmitting a libelous telegram that of the company, in the awarding of exemplary damages.[32]

Passenger Cases.—The distinction so vigorously denied in the excerpt I have made from the Prentice case to the effect that railroad corporations and other carriers stand on the different plane of liability for the acts of its servants than other principals, be they natural persons or corporations, has nevertheless found recognition in several of the state courts. One of the earliest in line is that of Goddard v. Grand Trunk R. R. Co.,[33] expressly approved in later holdings by the same court. It bases this distinction on the contractual obligation of the carrier to carry safely and properly, to treat respectfully and to protect its passenger from violence and insult from strangers, and, *a fortiori*, its own servants. Therefore, that case held the railroad company answerable in exemplary damages for an assault upon a passenger by its brakeman. In Tennessee this rule has been expressly approved,[34] and pushed to its limit in holding that, because of a dispute arising between an employee on a steamboat having no relation to his duties and a passenger on the boat, the passenger was assaulted, the protection, it was the obligation of the carrier to supply, was denied, and exemplary damages might be awarded.[35]

The courteous, safe treatment rule as based on the contractual obligation between passenger and carrier was enforced, also, as to the misconduct by a motorman on a street railway.[36] So also, in Kentucky, where there was gross, wanton or intentional neglect, or insulting conduct, in refusing to permit a passenger to stop at his destination.[37] However, this same court held that awarding exemplary damages for indecorous conduct was to make the rule too broad.[38] In Mississippi the capricious refusal to stop a train for a passenger to alight at his destination authorized exemplary damages.[39] In Maryland it was held that so long as one continued to be a passenger he was protected from assault by a conductor, but the use by him of foul language to the conductor might relieve from exemplary damages.[40] In South Carolina all employees to whom the safety and comfort of passengers are committed are held to be vested with the whole power and authority of the carrier, so as to make them the corporation *pro hac vice*.[41] But one cannot become a passenger with the expectation that a certain method of payment of his fare, which the law has declared to be legal, will be refused and the passenger ejected, and for the expected result recover more than com-

[25] Ricketts v. R. Co., 33 W. Va. 433, 7 L. R. A. 354. Hoehl v. Ry. Co., 119 Mo. 340.
[27] Perkins v. R. Co., 55 Mo. 201.
[28] Ry. Co. v. McDonald, 75 Tex. 1.
[29] Robinson v. Ry. Co. (Wis.), 34 L. R. A. 235.
[30] Shear. & Redf. on Neg. (4th. Ed.) 749.
[31] Ramsden v. Ry. Co., 104 Mass. 117.
[32] Peterson v. W. U. Tel. Co., 43 L. R. A. 581.
[33] 57 Me. 84.
[34] Haley v. R. Co., 7 Baxt. (Tenn.) 242.
[35] Transportation Co. v. Springer, 16 Lea, 501.
[36] Knoxville, etc. Co. v. Lane, 46 L. R. A. 549.
[37] Packet Co. v. Nagel, 97 Ky. 9.
[38] R. Co. v. Ballard, 85 Ky. 307.
[39] Wilson v. R. Co., 63 Miss. 352.
[40] R. Co. v. Barger, 80 Md. 231.
[41] Quinn v. R. Co., 29 S. Car. 381.

pensatory damages, as speculation in such a matter is abhorred.[42]

In conclusion it may be said that, independently of the fact of a corporation being or not a railroad corporation, it does appear that the Prentice case rather views the subordinate employee theory in too strict a manner and not in accord with the rule laid down by the text-writers, and that rather should the employee, who is given discretion in the execution of his particular employment, and who is not under strict supervision by the controlling officers of a corporation, be considered the corporation's representative whatever his rank or station. In other words, though as to other employees one might be considered a fellow-servant, as to third persons he ought rather to be regarded as the *alter ego* of the principal.

NEEDHAM C. COLLIER.

St. Louis, Mo.

[42] R. Co. v. Cole, 29 Ohio St. 126.

CHATTEL MORTGAGES—DESCRIPTION OF PROPERTY.

SWINNEY v. MERCHANTS' BANK OF KANSAS CITY.

Court of Appeals of Kansas City, Mo., June 2, 1902.

M became the owner of a note and mortgage on "412 coming three years old heifers, and upward," of a certain brand, located on a certain farm. A month later the mortgagor executed another mortgage, which was assigned to W, on "300 head of heifer cattle, coming two years old," having the same brand as those described in the first mortgage, located at a certain place. At the time of the execution of the first mortgage the mortgagor did not own any heifers coming three years old, but did own heifers coming two years old, which were the only heifers owned by him. These heifers were at the locations set forth in each mortgage at the time of the execution thereof. The first mortgage was properly recorded, but W, without making any investigations as to the cattle, or inspection of the record, accepted the second mortgage without knowledge of the first. Held that, rejecting the erroneous description of the age of the cattle contained in the first mortgage, the sex, brand, and location of the cattle constituted a sufficient description of the property intended to be covered, thereby validating the same, and the second mortgagee was affected with notice thereof.

SMITH, P. J.: The plaintiff, in this description, which was in the nature of a bill of interpleader, alleged that he had in his possession and under his control a certain promissory note given to him by one Cantelow, for $3,895.15, and that said note represented the proceeds of the sale of certain cattle sold to said Cantelow by the consent of both of the defendants; that prior to the sale of said cattle each of said defendants claimed to have some sort of a lien thereon, and that each of them claimed the said proceeds of sale. The petition contained a further allegation offering to bring the said note into court, united with a prayer that each of the defendants be required to interplead, setting up their respective rights and claims to said note, and that on bringing it—the note—into court he be discharged. The order was subsequently made requiring the defendants to interplead. Still later on, each of the defendants filed their interpleas, setting forth respectively their right, title, and claim to the note. The proceeding, after the filing of the bill of interpleader, was very irregularly conducted, both as to the pleadings and orders of the court.

The facts gleaned from the pleadings, stipulations and evidence may be summarized in this way: On December 11, 1899, one Cy. Howenstine, a stockman of Custer county, in the territory of Oklahoma, made to Ladd, Penny & Swazey, of Kansas City, live stock commission merchants of said city, his negotiable promissory note for $7,857.59, due 123 days after date, and to secure which he executed a certain mortgage of that date, covering the following described personal property, "now situate in Custer county, Oklahoma territory, to-wit: 435 head of stock cattle, coming 3 years old, and upward, worth $10,500 now. For further and better description, said cattle are marked and branded with one or more of the marks and brands as follows, viz: 412 coming three years old heifers, and upward; 23 head of bulls; all branded ‡ on the left hip. Also 2,000 bushels of corn, 200 tons of Kaffir corn and millet, to be fed the above-mentioned cattle during the life of this instrument. All increase of said cattle are especially covered hereby,— and are all the cattle of above brand and description owned by said party of the first part; the same being now located on farm of party of the first part, north and west of Arapahoe, Custer, Co., O. T., and being all the property of the above description owned or controlled by the mortgagor, now on said premises; and this mortgage is intended to cover and include all of said property of the above description, and any addition and increase thereto, located on the above-described premises and range, if any, thereabouts. The marks and brands used above to describe said property are the holding marks and brands, and carry the title, although said property may have other marks and brands." (1) It is conceded that the interpleader, the Merchants' Bank, was the owner of said note, and had acquired the same for value before maturity. (2) On the 10th day of January, 1900, the said Howenstine made a further negotiable promissory note to said commission merchants for $6,304, due August 6, 1900, and to secure which he executed a certain mortgage of that date, covering the following described personal property, "now situate in Custer county, Oklahoma territory, to-wit: 300 head of heifers cattle, coming two years old, described as follows: Value $6,900. All branded

‡ on left hip. Also 1,500 bushels of corn, 200 tons of roughness, consisting of straw, millet, and hay, to be fed to the above-mentioned cattle during the life of this instrument. All increase of said cattle are especially covered hereby,—and are all the cattle of above description owned by said party of the first part, the same being now located on leased farm of party of first part, near Arapahoe, Custer Co., O. T.; and being all the property of above description owned and controlled by the mortgagor now on said premises; and this mortgage is intended to cover and include all of said property of the above description, and any addition and increase thereto, located on the above-described premises and range, if any, thereabouts. The marks and brands used above to describe said property are the holding marks and brands, and carry the title, although said property may have other marks and brands." It is further conceded that the Wakefield State Bank is the owner of said promissory note, and that it acquired the same for value before maturity. (3) It was agreed that the cattle sold to said Cantelow, and for which the $3,895.15 note in controversy was given to plaintiff, Sweeney, were, on December 11, 1899, and on January 10, 1900, the property of said Howenstine, of Custer county, Oklahoma territory; "that said cattle were, on both of the dates above mentioned; heifers over one and under two year old, that on the dates above mentioned were all of the she cattle owned by said Howenstine in the brand hereinafter described; that all of said heifer cattle owned by said Howenstine, and sold to said Cantelow, as aforementioned, were branded on the left hip ‡ at the dates above mentioned, and were located in Custer county, Oklahoma territory, and in possession of said Howenstine; and that the term 'coming two years old' is understood by cattlemen throughout the country generally to mean more than one and less than two years old, and the term 'coming three years old' is understood by cattlemen throughout the country generally to mean over two and under three years old. And it is further agreed by and between the said defendants that on the 11th day of December, 1899, the cattle in controversy (that is, the cattle that were purchased by Mr. Cantelow, and for which the note in controversy was given) were located at the place described in the mortgage held by the defendant, the Merchants' Bank, and that on the 10th day of January, 1900, said cattle were located at the place described in the mortgage held by the Wakefield State Bank; that on the 11th day of December, 1899, said Howenstine did not own she cattle branded ‡ to exceed 412 head; and that he did not require any heifer cattle of that brand between December 11, 1899, and January 10, 1900."

There was a trial by the court of the issue between the two contesting interpleaders, which resulted in a decree in favor of the interpleader, the Wakefield Bank. The unsuccessful interpleader, the Merchants' Bank, brings the cause here by appeal.

It is thus made to appear from the stipulations that the cattle purchased by Mr. Cantelow, and for which he gave his note to plaintiff, were correctly described in the mortgage of January 10, 1900,—the second mortgage in order of time,—and that the Wakefield Bank is a *bona fide* owner for value, without notice, of the note secured by that mortgage. It results from this that the claim interposed by the interpleader, the Wakefield Bank, ought to be upheld, unless the said mortgage of December 11, 1899, constitutes a superior lien on said cattle so purchased by Mr. Cantelow to that of January 10, 1900, on the same cattle; and whether or not this is so depends upon the construction that is given the descriptive terms employed in the former. As has been seen, the description in the first of said mortgages calls for "412 coming three year old heifers, and upward, all branded ‡ on left hip," while that in the second calls for "300 head of heifer cattle coming two years old, all branded ‡ on left hip." It is agreed that the mortgagor at the time of the execution of the first mortgage owned and had located on his farm, in the county and state therein mentioned, heifers filling the description set forth in the second, but did not then or afterwards own or have any heifers filling the description set forth in the first, or, in other words, the mortgagor owned and had on his farm at the date of the execution of each of said mortgages heifers over one and under two years old in said brand, but did not at said dates own or have any other heifers or she cattle of that brand. It is thus seen that the only substantial difference in the description of the cattle contained in the first mortgage and that of those purchased by Mr. Cantelow, or, which is the same thing, that in the second mortgage, is as to the ages. The question decisive of the case is whether the age of the cattle as given in the descriptive clause of the first mortgage is merely an erroneous designation, which does not impair the validity or lien of said mortgage. If the age of the cattle was erroneously designated, yet if, after striking it from the description, enough remains to enable third persons, aided by the inquiries it suggests, to identify such cattle, that is all that is required to constitute a valid description. The rule is that a portion of the description in a mortgage which is erroneous may be rejected if the remainder of it is sufficient to pass the property. Jones, Chat. Mort. (4th Ed.) § 61; State v. Cabanne, 14 Mo. App. 294, 455; Goff v. Pope, 83 N. Car. 123. A misdescription of the age of horses or cattle mortgaged has been held not to be material, if the description is otherwise correct. Tolbert v. Horton, 33 Minn. 104, 22 N. W. Rep. 126. Where the description in a mortgage was vague and uncertain as to age, marks, and brands, but the mortgage located the cattle in a feed lot on a certain farm, and stipulated that it embraced all the cattle in the feed lot, it was held that if the cattle were at the placed named in the mortgage,

and were all the cattle named in the mortgage, and were all the cattle there, it was sufficient to make the lien of the mortgage valid, and to put other parties upon inquiry. Evans-Snyder-Buell Co. v. Turner, 143 Mo. 638, 45 S. W. Rep. 654. And to the same effect is Stonebraker v. Ford, 81 Mo. 532. At the time of the execution of the mortgage the mortgagor did not own and have on his said farm any she cattle of any age branded ‡ other than said heifers over one and under two years old. The intention of the parties as to what cattle were to be covered by the mortgage was made perfectly plain by the conceded fact that the mortgagor had no other she cattle which could by any possibility answer the mortgage description. If the interpleader, the Wakefield Bank, had taken the precaution to have looked, as it was required to do, at the record of mortgages of Arapahoe county, it would have there found the mortgage under which the interpleader, the Merchants' Bank, claims, unsatisfied, and covering 412 head of she cattle over two and under three years old, branded ‡ on left hip. If it had taken the trouble to go to the farm of the mortgagor, where, as recited in the mortgage, the heifers were to be found, it could have ascertained that the mortgagor did not, at the time of making said mortgage, own or have any she cattle on his said farm of that age and brand, and that the only she cattle he then or afterwards owned and had on his said farm were heifers over one and under two years old of that brand. He would have in that way found out that the description as to the age of the heifers so mortgaged was erroneous. It is apparent "that the erroneous part of the description not apply to any other cattle, nor did that part that was correct apply to any other cattle, and, taking the whole description together, it did not apply to any other cattle, so that no one could be misled by the description." Bank v. Com. Co. (lately decided by us, not yet officially reported), and cases there cited. And as the mortgagor did not at the time of, nor since, the execution of said mortgage, own or have on his said farm in said county of Arapahoe any she cattle of any age of the brand in said mortgage specified, except the heifers over one and under two years old, the conclusion is irresistible that, had the interpleader, the Wakefield Bank, exercised reasonable care at the time it purchased the second mortgage note, it could not have failed to discover the cattle described in said second mortgage were included in the first. It has been held that it is incumbent on one claiming under such an instrument, in order to charge a subsequent purchaser or incumbrancer with constructive notice, to show that the description and means of identification afforded by such an instrument are not so inexplicit that, had the latter exercised reasonable care at the time he became such purchaser or incumbrancer, he could not have failed to discover the property was included in the instrument. Yant v. Harvey, 55 Iowa, 421, 7 N. W. Rep. 675; Smith v. McLean, 24 Iowa, 322; Harris v. Kennedy, 48 Wis. 500, 4 N. W. Rep. 651; Tolbert v. Horton, 33 Minn. 104, 22 N. W. Rep. 126. As the mortgagor, at the time he made the first mortgage, had no she cattle of the brand specified in the description therein which were "three years coming," or over two and under three years old, that part of such description was, of course, wrong, and, if it be rejected because wrong, we have left remaining the sex, brand, and location; and, coupling these *indicia* of ownership with the fact that the heifers over one and under two years old were all the she cattle of any age in that brand that were at that time owned by the mortgagor, we cannot doubt that the first mortgage lien, under which the interpleader, the Merchants' Bank, claims, was a valid mortgage, and that the interpleader, the Wakefield Bank, at the time it acquired the note described in the second mortgage, according to the rules hereinbefore referred to, must be held to be affected with notice of the existence of the said first mortgage, and that the she cattle described in the second were included in the first, and subject to the lien thereof. There is no more evidence that the first mortgage was a fraudulent concoction than that the second was. Both of the interpleaders are innocent purchasers, for value, of the mortgage paper. We think the evidence sufficiently discloses that the first mortgage, under which the Merchants' Bank claims, was signed in the presence of two persons, who signed their names thereto as witnesses according to the requirements of the statute.

Our conclusion is that the interpleader, the Merchants' Bank, is entitled to the fund in question, and that the trial court erred in not so adjudging.

Accordingly the judgment will be reversed, and the cause remanded. All concur.

NOTE.—*What Constitutes a Sufficient Description of Cattle or Live Stock in a Chattel Mortgage so as to Bind Third Parties.*—The general rule on this question may be stated as follows: "A chattel mortgage, to be effectual as against third persons, must point out the subject-matter of it, so that a third person by its aid, together with the aid of such inquiries as the instrument itself suggests, may identify the property covered." Tindall v. Wasson, 74 Ind. 495; Gurley v. Davis, 39 Ark. 394; Scrafford v. Gibbons, 44 Kan. 533; Cass v. Gunnison, 58 Mich. 108, 25 N. W. Rep. 52; County Bank v. Shackelford, 67 Mo. App. 475; Rawlins v. Kennard, 26 Neb. 181; Jones on Chattel Mortgages, § 55. While this may be a correct statement of the general rule it is not always an easy problem to apply it to individual cases and especially in cases of mortgages upon cattle and other live stock. While the authorities are abundant, we believe no satisfactory solution of this question can be determined otherwise than by resort to the most recent cases illustrating the application of the general rule to individual cases.

The question of supreme importance is the possibility of identifying the property either by the literal description embodied in the mortgage contract or by inquiries which that instrument would naturally suggest; but the point of greatest difficulty lies in determining what inquiries are reasonably suggested by the instrument. A clever, resourceful mind might

find in an instrument suggestions of inquiry which a mind of more ordinary ability would not discover. So also a description, perfectly clear to the immediate parties to the contract, might furnish no accurate means of identification at all to a third person. The true rule would, therefore, seem to be that the inquiries suggested by the instrument must be such as naturally arise therefrom and would be discernible by men of ordinary intelligence. Of course, the ordinary intelligence here referred to is that applicable to men conversant with the particular subject-matter of the mortgage. Thus many terms easily understood by cattlemen, and which to them would suggest many natural inquiries, might be totally incomprehensible to men without any knowledge or experience in the raising of cattle. The description of property in a chattel mortgage, therefore, is to be interpreted in the light of facts known to and in the minds of the parties at the time. "A subsequent purchaser," says Mr. Justice Cooley in the case of Willey v. Snyder, 34 Mich. 60, "is supposed to acquire a knowledge of all the facts so far as may be needful to his protection and he purchases in view of that knowledge. If he purchases a bull known in the neighborhood by a particular name, he is chargeable with notice of that fact. A mortgage of a bull by that name, if duly filed, would be as good against him as against the man who gave it. It would be a singular defense to set up by him to the mortgagee that, being a stranger, he discovered no such name on or about the bull. Descriptions do not identify themselves; they only furnish the means of identification. They give us certain marks or characteristics—perhaps historical *data* or incidents—by the aid of which we may single out the thing identified from all others; not by the description alone, but by that explained and applied."

With these general principles in mind let us note their application in the latest authorities. In the case of Barrett v. Fisch, 73 Iowa, 553, 41 N. W. Rep. 310, 14 Am. St. Rep. 238, it was held that a description "one sorrel horse, three years old," is not sufficiently definite to impart constructive notice to third parties, though the mortgage also recites the mortgagor's place of residence. In a later case, however, the same court held that a description of horses as of given colors, ages and weights, all kept in the stable of the the mortgagee, is sufficient. Citizens' National Bank v. Johnson, 79 Iowa, 290, 44 N. W. Rep. 551. These two cases quite accurately give the distinction between a description which puts a third party upon inquiry and one which does not. In the case of Harkey v. Jones, 54 Ark. 158, 15 S. W. Rep. 192, it was held that a recorded mortgage of a "brindle cow, about three years old and her increase," is sufficient to put a purchaser upon inquiry as to the property covered, and the fact that the mortgagor has another cow of substantially the same description does not relieve him of that duty. In this case the court said: "The description in the mortgage, though general, was sufficient to put a party intending to purchase it on inquiry, and the defendant, purchasing from the mortgagor, was bound to ascertain whether the property he bought was the same covered by the mortgage." However, where a chattel mortgage of horses and mules merely describes them as "gray," "mixed," etc., or by name only, the mortgage is void as to third persons for uncertainty of description. Tabor v. Sampson, 7 Colo. 426 Color, age and name are a sufficient identification. "Thus one sorrel horse, twelve years old, called Tom," though the location is not named, is sufficient notice to third parties. Koehring v. Aultman, 7 Ind. App. 475, 34 N. E. Rep. 30. It is insufficient to describe the property mortgaged as "sixty head of two and three year old steers and forty head of yearling steers." Caldwell v. Trowbridge, 68 Iowa, 150. So also a description "one span of colts three years old, one gray and one bay," contains nothing by which the particular property could be identified by a third party. Rhutasel v. Stephens, 68 Iowa, 627. The courts of Kansas and Mississippi have laid down the rule in its application to mortgages of cattle as follows: "A description in a chattel mortgage which gives the age, sex, ownership and location of a number of cattle is sufficient, though they are in a pasture with cattle belonging to others, if by the inquiries suggested by the description they can be distinguished. Wagoner v. Ousler, 54 Kan. 141, 37 Pac. Rep. 973; Nicholson v. Karpe, 58 Miss. 34. An error in stating the age of cattle is not fatal to its validity. Peters v. Parsons, 18 Neb. 191; Brase Line Stock Commission Co. v. Turner, 54 Kan. 778. But a mistake in color is fatal. Bowman v. Roberts, 58 Miss. 126. A description giving the color, age, size and location is sufficient in Missouri. Campbell v. Allen, 38 Mo. App. 27. But a description in a chattel mortgage as "ten head of cattle, mixed lots, cows, heifers and others," is not sufficient for third persons to identify the property. Chandler v. West, 37 Mo. App. 631. Texas is quite liberal in her requirements as to what should constitute a valid description. Thus in the case of Lapowski v. Taylor, 13 Tex., Civ. App. 624, 35 S. W. Rep. 934, the court held that a description in a chattel mortgage, including all horses belonging to the mortgagor in a certain county and the counties thereto adjoining, was not void for uncertainty.

Identification by Marks, Brands or Herd Books.—Whether identification by marks or brands is sufficient is differently decided in different jurisdictions. Thus in Texas, where the courts look with extreme favor on mortgages of cattle, it was held that such a description is perfectly valid. Thus a description of property in a chattel mortgage as "all my sheep branded either S or V, consisting of about 1,600 head of sheep was not indefinite, and included all the mortgagor's sheep, in both brands named. Ballinger National Bank v. Bryan, 12 Tex. Civ. App. 673, 24 S. W. Rep. 456; Ft. Worth Nat. Bank v. Red River Bank, 84 Tex. 369, 19 S. W. Rep. 369. So also in Oregon Commercial Natl. Bank v. Davidson, 18 Oreg. 57, 22 Pac. Rep. 517, where it was held, however, that the location must be clearly set forth. In Colorado the simple brand mark is good only between the parties, but not as to third persons. Horn v. Reitler, 12 Colo. 310, 21 Pac. Rep. 186. In Iowa it is held that a description by brand alone is not sufficient to impart constructive notice, in the absence of anything indicating the location or ownership of the property at a particular time. Andregg v. Brunskill, 87 Iowa, 351, 54 N. W. Rep. 135, 43 Am. St. Rep. 388. An error in stating the form or character of the mark or brand is fatal. New Hampshire Cattle Co. v. Bilby, 37 Mo. App. 43. Mere reference to a herd book, however, is insufficient. Thus a chattel mortgage described the property as "nineteen Hereford cattle," giving their names, and adding, "the above names are recorded in the American Hereford Herd Book." The court held such an identification too indefinite to bind third parties. Taylor v. Gilbert, 92 Iowa, 587, 61 N. W. Rep. 203.

JETSAM AND FLOTSAM.

LIFE INSURANCE AS A MEANS OF BETTING UPON THE LIFE OF A KING OR PRESIDENT.

London dispatches say that British underwriters will now be compelled to pay out from $4,500,000 to $5,000,000 which they have pledged that the king would be crowned June 26, 1902. If the king should die, say the dispatches, the British insurance companies and private underwriters would have to pay out no less than $21,000,000.

Little or none of this enormous total is what would be regarded, from the viewpoint of American customs and laws, as legitimate insurance. Nearly or quite all these contracts, calling for upward of $25,000,000, American courts would promptly set aside as gambling and contrary to public policy. Furthermore, American public sentiment would regard such contracts as offenses against decency.

Imagine for an instant that thousands of American business men, while Mr. McKinley lay dying, should have entered into contracts whereby one party, in consideration of $30 paid down, should agree in each case to pay the other $100 if Mr. McKinley did not live six days. Yet such contracts, if not actually made, were at least mooted in London on Wednesday, where the premium for insurance on the king's life for six days was openly quoted at 30 per cent.

There is, perhaps, no other striking illustration of the difference between the English and American viewpoints than that contracts which here would be regarded as gross affronts to public decency are there made as a matter of course, and are enforceable at law.

Yet it cannot be said that Englishmen lack loyalty to their rulers. In fact, they are notable for such loyalty. It merely is not their viewpoint to perceive the strangeness of thus staking great sums as if they had in the life or death of their sovereign only an abstract or a money interest.

To Americans it is clear how such bets upon the life of a ruler might be made, in the hands of unscrupulous men, an incentive to his murder. The perception of such consequences has led American legislatures and courts to condemn any insurance contract whose beneficiary has no interest, by relationship, dependence or money actually advanced, in the continued life of the insured.

If Americans wish to gamble upon the lives of their presidents, or of third persons in whom they have no real private and personal interest, they must do so secretly and in fear of the law. They may not do so openly and with the support of the law, as do Englishmen.—*Chicago Inter Ocean.*

HUMORS OF THE LAW.

NOT IN A CODE STATE.

"To me, I swear, you're a volume rare"—
But, she said, with judicial look,
"Your oath's not valid at common law
Until you've kissed the book."

A Spanish magistrate, shocked by the extent of the food adulteration, issued a proclamation, aflame with righteous wrath, that "all wines, groceries and provisions, which, upon analysis, are proved to be injurious to health, will be confiscated forthwith, and distributed to the different charitable institutions."

A former chief justice of the Supreme Court of Missouri had been confined for some weeks to his room, suffering from a severe indisposition. Having somewhat recovered he ventured out of his room and walked down to the state library, where he was accosted by the librarian, at that time Colonel J. W. Zevely, who inquired after his health and received this reply:

"William, I am not well; but I am better than I was when I was worse than I now am!"

Doctor—I am slightly in doubt as to whether yours is a constitutional disease or not.

Patient—For heaven's sake, doctor, have I got to go to the expense of appealing to the United States Supreme Court to find out whether it is or not?

One evening "Jake" Dawson's name was drawn by lot in the *extempore* class and he was asked to speak *impromptu* on some subject. Jake came from out west, where he had grown up with the country to the length of six feet seven inches, and was limber, lank and lumbering—a jolly, great, good natured bashful boy. He rose, dragged his feet to position, hitched up his arms, cleared his throat with a cough like the bark of a coyote and tried to begin. "Ugh! Mr. Chairman—Ugh! This is an interesting subject, Mr. Chairman—Ugh!—A subject of great interest. There are, ah, three ways of treating this subject, ah. Ugh! I do not happen to think of any of them!" and sat down.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. ABATEMENT AND REVIVAL — Ejectment.—Ejectment cannot be maintained during the pendency of a prior action between the same parties as to same realty.—Shaughnessy v. St. Andrew's Church of Tecumseh, Neb., 89 N. W. Rep. 263.

2. ABATEMENT AND REVIVAL—Punitive Damages.—Under Code, §§ 1916, 1917, the death of the party assailed

does not terminate the right to recover punitive damages.—Wagner v. Gibbs, Miss., 31 South. Rep. 434.

3. ABATEMENT AND REVIVAL—Want of Jurisdiction.—Where defendant is privileged from suit in the county where or at the time when he is sued, he may set up want of jurisdiction by answer, without first making a special appearance. Baker v. Union Stock Yards Nat. Bank, Neb., 89 N. W. Rep. 269.

4. ADVERSE POSSESSION - By Grantor. - Where a grantor with covenant of warranty subsequently enters on possession of his grantee, a new title may be established by adverse possession. Horbach v. Boyd, Neb., 89 N. W. Rep. 644.

5. APPEAL AND ERROR—Conflicting Evidence.—Where there is evidence to support the verdict, though conflicting, it will not be disturbed.—Schaaf v. Hamilton, Neb., 89 N. W. Rep. 614.

6. APPEAL AND ERROR Damages.—Where a jury has specially found that there was no damage, it is immaterial whether instructions as to justification of the alleged injury were supported by the pleadings. - Axthelm v. Chicago, R. I. & P. R. Co., Neb., 89 N. W. Rep. 312.

7. APPEAL AND ERROR – Default Judgment. The appellate court will not disturb a default judgment against defendant, it being unable to deny that the trial court, without abuse of discretion, might have reached the conclusion that defendant's absence from trial on the ground of sickness was not excusable. - Rogers v. Fate, Wis., 89 N. W. Rep. 186.

8. APPEAL AND ERROR - Defective Record.—Where the record on appeal does not show the rendition of judgment on certain demurrers, the mere statement by the clerk in the record that the court made certain rulings thereon is not sufficient to authorize a review thereof.—Cowan v. Campbell, Ala., 31 South. Rep. 429.

9. APPEAL AND ERROR—Erroneous Judgment.—The question whether a judgment is erroneous cannot be determined by statements of the court on the hearing of a motion for new trial, but only by what was done during the trial. Lauer v. Palms, Mich., 89 N. W. Rep. 694.

10. APPEAL AND ERROR — Errors Insufficient to Set Aside Verdict. Where it is clear that the verdict was the only one which could be properly returned, it will not be set aside for errors occurring at the trial.—Albion Milling Co. v. First Nat. Bank, Neb., 89 N. W. Rep. 638.

11. APPEAL AND ERROR — Exceptions Improperly Taken. Where exceptions to instructions are filed which were not properly taken when the instructions were given, they have no place in the record, and should be stricken out on motion in the lower court.—City of Lincoln v. Sager, Neb., 89 N. W. Rep. 617.

12. APPEAL AND ERROR - Failure of Record to Show Exceptions.—The supreme court cannot pass on assignments of error, where the record fails to show any rulings on or exceptions to the matters complained of below.—Wells v. Fetzer, Neb., 89 N. W. Rep. 596.

13 APPEAL AND ERROR — Foreclosure of Mortgage.—Two decrees in a suit to foreclose a mortgage having been entered, and a notice of appeal having been given without specifying which decree it applied to, in the absence of either bond or security for costs which could be referred to an appeal from the second decree, the appeal held not to have been taken therefrom —United States Savings & Loan Co. v. Leftwich, Ala., 31 South. Rep. 474.

14. APPEAL AND ERROR—Imperfect Undertaking.—Testimony of surety as to what he was told when signing bond held inadmissible, without evidence of who told him or that he relied on the statement.—Coughran v. Hollister, S. Dak., 89 N. W. Rep. 647.

15. APPEAL AND ERROR — Joint Assignments of Error. —Where the assignments of error are joined in by all of the appellants, injury to all must be shown to result from the error complained of, or the decree will not be reversed. - Woodruff v. Smith, Ala., 31 South. Rep. 491.

16. APPEAL AND ERROR New Matter.—Where the parties to an action treat the allegations of new matter in the answer as denied, the supreme court will so treat it, though no reply appears in the record.—Loan & Trust Co. Sav. Bank v. Stoddard, Neb., 89 N. W. Rep. 301.

17. APPEAL AND ERROR New Trial. - Where a motion for new trial is overruled, because not made in due time, all matters included therein as ground for new trial are unavailable on review in error.—Harris v. Jennings, Neb., 89 N. W. Rep 625.

18. APPEAL AND ERROR — Nominal Damages to Establish Right or Title. - A judgment will not be reversed to permit recovery of nominal damages, unless the recovery will establish some right or entitle the plaintiff to costs.—School Dist. No. 80 of Nemaha County v. Burress, Neb., 89 N. W Rep. 600.

19. APPEAL AND ERROR—Presumption as to Evidence. —Where the evidence is not in the record, it will be presumed in support of a judgment for plaintiff that it was rendered on sufficient evidence. Rumney v. Detroit & M. Cattle Co., Mich., 89 N. W. Rep. 573.

20. APPEAL AND ERROR - Res Judicata.—Where, in ejectment, an issue *res judicata* is decided in complainant's favor, defendant does not appeal, and the bill of exceptions is settled for considering plaintiff's assignment of error, the decision cannot be reviewed.—Carpenter v. Carpenter, Mich., 89 N. W. Rep. 717.

21. APPEAL AND ERROR - Reversal of Single Defendant —In an action against three co-defendants, where judgment was rendered against all three, from which only one appealed, reversal of the judgment as to appellant left the judgment still in force as to the other defendants.—Merchants' Nat. Bank v. Stebbins, S. Dak., 89 N. W. Rep. 674.

22. APPEAL AND ERROR Review of Order.—A judgment on appeal from an order of an excise board granting a license will not be reviewed, in the absence of a duly-certified transcript of the application, remonstrance, and final order.—Marfending v. Jones, Neb., 89 N. W Rep. 290.

23. APPEAL AND ERROR — Several Judgments.—Where only one of two defendants is served with process, and the action admits of a several judgment, the defendant who was served and tried the case cannot complain that the judgment was entered irregularly against the other defendant.—Storey v. Kerr, Neb., 89 N. W. Rep. 601.

24. APPEAL AND ERROR — Sufficiency of Answer.—Where plaintiff did not in any manner question the sufficiency of the answer below, the court could not, on appeal, treat it as insufficient.—Doering v. Kohout, Neb. 89 N. W. Rep. 278.

25. APPEAL AND ERROR - Temporary Injunction.- The right to appeal from an order granting a temporary injunction is not waived by proceeding to trial in the main case after the issues have been materially changed, and the appeal will be considered, though the questions presented may be considered on appeals taken in the main case.—Stewart v. Pierce, Iowa, 89 N. W. Rep. 234.

26. APPEARANCE - Defects in Process Waived.—Where the court has no jurisdiction by defects in the process if defendant enters a general appearance or invokes the powers of the court for any other purpose than quashing the process, the defects are waived. - Baker v. Union Stock Yards Nat. Bank, Neb., 89 N. W. Rep. 269.

27. ASSAULT AND BATTERY—Punitive Damages.- $2,000 punitive damages held not excessive for assault.—Wagner v. Gibbs, Miss , 31 South. Rep. 434.

28. ASSISTANCE, WRIT OF—Sale Under Foreclosure.—A court, making a sale under foreclosure, may issue a writ of assistance to the purchaser.—Magruder v. Kittle, Neb., 81 N. W. Rep. 272.

29. BANKS AND BANKING—Appropriation of Trust Fund.—Where a bank appropriates a trust fund on deposit with it to the payment of a debt due the bank from the trustee, it is liable therefor.—Nehawka Bank v Ingersoll, Neb., 88 N. W. Rep. 618.

30. BANKS AND BANKING – Checks.—In an action for the amount of an unpaid check, held proper to instruct that the bank on which it was drawn was not a suitable agent for its collection. – Carson, Pirie, Scott & Co. v. Fincher, Mich., 89 N. W. Rep 570.

31. BANKS AND BANKING—Refusal to Honor Check. – A bank cannot refuse to honor checks of a depositor on the ground that the money deposited belongs to another. – Nehawka Bank v. Ingersoll, Neb , 89 N. W. Rep. 618

32. BENEFIT SOCIETIES – Illegal Assessments. – Where a beneficial society promised to pay in six years $1,200 for $432 in assessments, and did pay such sums to the holder of a certificate, a receiver of the society could not recover such payment to make an equal distribution among all members. — Calkins v. Green, Mich., 89 N. W. Rep. 587.

33. BILLS AND NOTES – Attorney's Fee.—The collection by an attorney of the principal and interest on an attorney fee note after it has matured does not preclude the attorney, to whom the note is assigned, from maintaining a suit against the maker to recover the attorney fee.—Cowan v. Campbell, Ala., 31 South. Rep. 429.

34. BILLS AND NOTES – Consideration. – Where moneys are advanced on the representation that the person named will sign a note given therefor, and he does so, there is a sufficient consideration for such signing. — Baker v. Union Stock Yards Nat. Bank, Neb., 89 N. W. Rep. 269

35. BILLS AND NOTES—Failure of Consideration. Consideration for note held to have failed, the article for which it was given having been taken back by the seller. — McBryan v. Universal Elevator Co., Mich., 89 N. W. Rep. 683.

36. BILLS AND NOTES—Partial Payments.— There is no legal presumption that indorsements were made on a note from the mere fact of partial payment. – Storey v. Kerr, Neb., 89 N. W. Rep. 601.

37. BRIDGES—Contribution for Repairs.—Under Comp. St. ch 78, § 89, as amended, where a public bridge has been constructed across a stream, dividing two counties, one county may be compelled to contribute towards the necessary repairs though there was no contract between the counties. — Cass County v. Sarpy County, Neb., 89 N. W. Rep. 291.

38. BRIDGES — Natural Decay. — Where a defect in a highway bridge is the result of natural decay, the municipality cannot escape liability therefor because its officers did not have actual notice of the precise defect which was the cause of an accident. – Green v. Town of Nebagamain, Wis., 89 N. W. Rep. 520.

39. BROKERS – Right to Commissions. – Broker held entitled to commissions for selling mine, though the contract of sale was canceled by the parties thereto. — Mattes v. Engel, S. Dak., 89 N. W. Rep. 651.

40. CANCELLATION OF INSTRUMENTS — Conditional Sale.—An agreement providing for payment of a certain sum for a machine, legal title to remain in the seller until the note is paid, held not a chattel mortgage, failure to discharge which, on payment, rendered the mortgagee liable for a penalty, under Comp. St. ch. 32, § 15. – McCormick Harvesting Mach. Co. v. Mills, Neb., 89 N. W. Rep. 621.

41. CARRIERS—Demurrage Rules.—Where reasonableness of demurrage rule of carrier for time over 48 hours a car remaines unloaded after it is ready for delivery is not denied, the reasonableness need not be submitted to jury. — Pennsylvania R. Co. v. Midvale Steel Co., Pa., 51 Atl. Rep. 313.

42. CARRIERS — Passenger's Assumption of Risk. — A passenger, standing on the side steps of an open street car, when there is room inside, assumes the risk of dangers incident thereto. — Woodroffe v. Roxborough, C. H. & N. Ry. Co., Pa., 51 Atl. Rep. 324.

43. CERTIORARI – District Court's Jurisdiction.—Where a *certiorari* proceeding merely determines the district court's jurisdiction in a certain matter, the judgment therein held not to preclude an appeal involving other questions. — Porter v. Butterfield, Iowa, 89 N. W. Rep. 199.

44. CHATTEL MORTGAGES — Right of Mortgagee. — A chattel mortgagee, on the failure of the mortgagor to pay the debt at maturity, has the absolute title to the mortgaged property and right of possession, subject only to the right of the mortgagor of prior mortgagees to redeem. — Klinkert v. Fulton Storage & Mercantile Co., Wis., 89 N. W. Rep. 507.

45. CONSTITUTIONAL LAW—Appointment of Trustees.—Code, § 747, as amended by Acts 27th Gen. Assem. ch. 23, and Acts 28th Gen. Assem. ch. 25, authorizing the district court to appoint trustees of waterworks in cities of the first class, is unconstitutional and void as authorizing the performance by a court, which is subject to Const. art. 3, § 1, of a non-judicial function not connected with its judicial powers. — State v. Barker, Iowa, 89 N. W. Rep 204.

46. CONSTITUTIONAL LAW — Inheritance Tax. — Laws 1899, ch. 355, authorizing taxation of the inheritances of the same size, if the estate is over $10,000, and denying the taxation if the estate is under $10,000 in value, is in violation of Const. Wis. art 1, and United States Const. U. S. Amend. 14. — Black v. State, Wis., 89 N. W. Rep. 522.

47. CONSTITUTIONAL LAW— Repairing Sidewalks. — A statute imposing upon lot owners in a city the duty of repairing sidewalks adjacent to their premises held not unconstitutional. — City of Lincoln v. Janesch, Neb., 89 N. W. Rep. 280.

48. CONTEMPT Bribing Jurors.— The fact that an attempt to bribe a juror involves a criminal charge does not deprive the court of power to punish it as a contempt.—Nichols v. Judge of Superior Court of Grand Rapids, Mich., 89 N. W. Rep. 691.

49. CONTRACTS Fraudulent Representations.—A contract cannot be avoided for fraudulent representations, unless damage is shown. — Bomar v. Rosser, Ala., 31 South. Rep. 430.

50. CONTRACTS - Pleadings.—In an action on a contract alleged to have been made June 7th, testimony showing modification thereof made on the following day, held properly rejected, as a variance from the pleadings.— Duval v. American Telephone & Telegraph Co., Wis., 89 N. W. Rep. 482.

51. CONTRACTS – Practical Construction. — A contract, when considered in connection with a practical construction thereof, held to give one of the parties thereto an equal interest in the stock of a corporation acquired in pursuance of the contract. — Stewart v. Pierce, Iowa, 89 N. W. Rep. 234.

52. CONTRACTS – Written and Oral. – A mixed written and oral contract, the terms of which are disputed, is for the jury. — City of Philadelphia v. Stewart, Pa., 51 Atl. Rep. 348.

53 CORPORATIONS—Averment of Capacity.— A corporation may sue in its corporate name at common law without an averment of its corporate capacity, and the Code has not changed the rule in that respect – Loan & Trust Co. Sav. Bank v. Stoddard, Neb., 89 N. W. Rep. 301.

54. CORPORATIONS – Conditional Liability.– Bill to enforce stockholders' liability may be maintained by a single judgment creditor, and without leave of court. – McBryan v. Universal Elevator Co., Mich., 89 N. W. Rep. 683.

55 CORPORATIONS — Control by Court of Equity. — Where a court of equity has not taken possession of corporation property, but has only gone to the extent of directing the corporation's conduct in reference thereto, it cannot require the corporation to retain an employee whose term of service has expired. – Stewart v. Pierce, Iowa, 89 N. W. Rep. 234.

56. CORPORATIONS — Mortgages by Officers to Themselves.—Mortgage by officers of a corporation to them-

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selves for the purpose of securing alleged indebtedness to themselves and other creditors held not sustainable for the purpose of protecting other creditors.—Macklem v. Fales, Mich., 89 N. W. Rep. 581.

57. CORPORATIONS—Notice. — A corporation is bound only by notice to some of its officers with the power to act on the notice, or to one whose duty it is to communicate the notice to its officers. — Nehawka Bank v. Ingersoll, Neb., 89 N. W. Rep. 618.

58. CORPORATIONS Suit Where Officers Reside.—Street railway corporation, whose roadbed and principal office are in one county, may be sued in another county, where officers reside, and it has an office, and much of its corporate business is transacted. — Jensen v. Philadelphia, M. & S. St. Ry. Co., Pa., 51 Atl. Rep. 311.

59. COSTS—Bonds Signed in Blank.— Bonds signed in blank and left with justice of the peace held not a compliance with Comp. Laws, § 1061, providing that no warrant shall be issued by him without security for costs. — Hutchinson v. Board of Sup'rs of Iona County, Mich., 89 N. W. Rep. 561.

60. COSTS — Compensation for Defending Indigent Persons.—Attorneys appointed by the court to defend indigent persons accused of crime are not entitled to compensation for time spent in preparation for trial, under Rev. St. 1898, § 4713.— Green Lake County v. Waupaca County, Wis., 89 N. W. Rep. 549.

61. COURTS — Lumping Claims for the Purpose of Jurisdiction. Persons appealing from the orphans' court cannot lump their claims, so as to give the supreme court, rather than the superior court, jurisdiction. — *In re* Sampson's Estate, Pa., 51 Atl. Rep. 325.

62. CREDITORS' SUIT - Pledged Property.—A creditors' bill, under Rev St. ch. 77, § 6, par. 4, is not the proper process for a pledgee to enforce his claim against the pledgor and the property pledged. — Shaw v. Monson Maine State Co., Me., 51 Atl. Rep. 285.

63. CRIMINAL TRIAL—Examination of Witness —Where questions asked by the judge of the witnesses are of a character to induce a belief that the court is of the opinion that the accused is guilty, a conviction will be reversed.—Leo v. State, Neb., 89 N. W. Rep. 303.

64. DAMAGES—Evidence. — In action for personal injuries, evidence as to falling off of receipts of plaintiff's business was admissible on the question of damages. — Hart v. Village of New Haven, Mich., 89 N. W. Rep. 677.

65. DESCENT AND DISTRIBUTION — Advancements. — Notes given by a child to a parent in payment for money furnished are presumed to represent debts, not advancements, in the absence of evidence of a contrary intention.—Sprague v. Moore, Mich., 89 N. W. Rep. 712.

66. DESCENT AND DISTRIBUTION—Vesting Title.—Under Comp. St. 1901, ch. 23, §§ 209, 292, real estate other than the homestead of intestate descends to his heirs, and the title vests immediately, subject to the administrator's right of possession and application to decedent's debts. — Security Inv. Co. v. Lottridge, Neb., 89 N. W. Rep. 298.

67. DISMISSAL AND NONSUIT — Action in Account.— Where, in an action for an accounting, the answer is a general denial and plea of settlement, and plaintiff demurs, and after an adverse ruling stands on his demurrer, a judgment of dismissal is proper. — Brown v. Houghton, Neb., 89 N. W. Rep 251.

68. ELECTRICITY - Injury Caused by Hanging Wire.— In an action for injuries to a horse and vehicle caused by a broken electric wire hanging down on a street, evidence held sufficient to warrant the jury in finding that injury was caused by the wire.—Chaperon v. Portland General Electric Co., Oreg., 67 Pac. Rep. 928.

69. EMINENT DOMAIN - Ejectment.—Where a landowner has permitted a railroad company possessing the right of eminent domain to build a line of road across his land, he cannot maintain ejectment to recover the right of way. Buckwalter v. Atchison, T. & S. F. Ry. Co., Kan., 67 Pac. Rep. 831.

70. EMINENT DOMAIN Excessive Verdict.—A verdict for $1,987 for the appropriation of about seven acres of land for a right of way across a tract the assessed valuation of which was only $1,038 was excessive.—Yazoo & M. V. R. Co. v. Adams, Miss., 31 South. Rep. 427.

71. ESTOPPEL—Grantor Acquiring Adverse Possession. —The grantor in a deed with covenant of warranty may acquire a new title adverse to a grantee by a subsequent entry and adverse possession.—Horbach v. Boyd, Neb., 89 N. W. Rep. 644.

72. EVIDENCE—Action on Note.—In an action on a note, a contention that the body of the note was written by plaintiff above a genuine signature of deceased was not an admission of the genuineness of the note.—Mack v. Cole's Estate, Mich., 89 N. W. Rep. 564.

73. EVIDENCE—Admissibility of Foreign Church Records.—Rev. St. 1898, § 4160, making church and parish records of births and deaths admissible as *prima facie* evidence, is applicable to such records kept pursuant to the laws of a foreign country.—Sandberg v. State, Wis., 89 N. W. Rep. 504.

74. EVIDENCE—Assignment of Judgment. — Parol evidence is admissible to show that an absolute assignment of a judgment was intended as security, and also the amount of the debt secured. — Robinson's Exrs. v. Blood's Heir, Kan., 67 Pac. Rep. 842.

75. EVIDENCE—Competency to Prove Value.—One who purchases a horse for the special business in which he is engaged, and who uses the horse for a considerable time, may give an opinion as to the value of the horse. —Chaperon v. Portland General Electric Co., Oreg., 67 Pac. Rep. 928.

76. EVIDENCE Justice Summons Signed in Blank.— Where a justice did not in fact issue a summons, but only a signed blank, his docket entries of the issue of the summons may be disputed.—Johnson v. Turnell, Wis., 89 N. W. Rep. 515.

77. EVIDENCE—Non-Expert Testimony.—Permitting a non-expert to state that water was nasty and filthy, though erroneous, is without prejudice, where he narrated the facts on which he based his conclusion.—Hollenbeck v. City of Marion, Iowa, 89 N. W. Rep. 210.

78. EVIDENCE—Overcoming Terms of Deed by Parol Evidence.—Where a plaintiff seeks to overcome the presumption arising from the express terms of a deed by parol evidence, much more certainty and conclusiveness are required than in ordinary cases.—Doane v. Dunham, Neb., 89 N. W. Rep. 640.

79. EVIDENCE—Warranty of Quality.—In a sale of personal property, parol evidence is inadmissible to show a warranty of quality, where the contract of sale is in writing.—Ehrsam v. Brown, Kan., 67 Pac. Rep. 867.

80. EXCEPTIONS, BILL OF Time of Filing.—Where a statute authorizes "the court" to extend the time of filing a bill of exceptions, an order granting such extension may be made by the judge during vacation.—Louisville & N. R. Co. v. McDonald, Miss., 31 South. Rep. 417.

81. EXECUTIONS—Levy of Attachment.—Comp. Laws 1897, § 9224, held not to give an execution, by relation back to time of levy of attachment, precedence over a prior mortgage recorded after levy of attachment, but before levy of execution.—Campbell v. Keys, Mich., 89 N. W. Rep. 720.

82 EXECUTIONS Perishable Goods.—Where an execution is levied on a peach crop or other perishable goods, the provision of Code, art. 83, § 3, that ten days' notice of sale shall be given, does not apply; but the sheriff should obtain from the court authority for an immediate sale.—Arnold v. Fowler, Md., 51 Atl. Rep. 299.

83. EXECUTION Substantial Right.—The rights of a judgment creditor to take out an execution can only be taken away by some proceeding for this purpose in compliance with law.—Haimes v. Dovey, Neb., 89 N. W. Rep. 631.

84. EXECUTORS AND ADMINISTRATORS—Setting Aside Conveyance.—An administrator's bill to cancel a deed

by his intestate being an attack on it for the benefit of all persons interested in the estate, a decree granting such relief cannot be disturbed as affecting the interests of a person not a party.—Travis v. Parks, Mich., 89 N. W. Rep. 569.

85. EXECUTORS AND ADMINISTRATORS.—Uncorroborated Evidence.—The uncorroborated evidence of a daughter as to transactions with her father and mother held insufficient to create a charge on the estate of either after their death.—Cochrane v. McEntee, N. J., 51 Atl. Rep. 279.

86. FENCES—Statutory Notice.—A person giving the notice provided for by Pen. Code, art. 797, is not guilty of a violation of article 794, for cutting loose his fence from the fence of another.—Dennis v. State, Tex., 66 S. W. Rep. 838.

87. FIRE INSURANCE—Transferring Insurance.—Written permit, transferring insurance to another building, held to render company liable for loss, though not attached to the policy until after the fire.—Bennett v. Western Underwriters' Assn., Mich., 89 N. W. Rep 702.

88. FIXTURES—Houses. Houses intended as permanent annexations to the freehold become a part of the realty.—Moore v. Moran, Neb., 89 N. W. Rep. 629.

89. FORCIBLE ENTRY AND DETAINER—Special Plea.—A special plea, in an action for forcible entry and detainer, that plaintiff had previously forcibly entered and detained the premises, and then abandoned them, whereupon defendant peacefully entered, held properly stricken.—Bibby v. Thomas. Ala., 31 South. Rep. 432.

90. FRAUD—Honest but Mistaken Opinion.—Where one gives an honest opinion as to another's financial standing, based on information which he imparts to the inquirer, the fact that he was mistaken will not make him liable to deceit to one acting thereon.—Albion Milling Co. v. First Nat. Bank, Neb., 89 N. W. Rep, 638.

91 FRAUDS, STATUTE OF Boundary Line.—Neither a surveyor whom plaintiff directed to locate the line in controversy, nor her son, whom she told to assist him, held authorized to bind plaintiff by an agreement locating the line.—Higginson v. Schaneback, Ky., 66 S. W. Rep. 1040.

92. FRAUDS, STATUTE OF—Oral Promise.—An oral promise by a wife, either individually or as executor of her husband, to pay a debt due her daughter for advances to the husband for the support of his family, which is the husband's debt, is invalid under the statute of frauds.—Cochrane v. McEntee, N. J., 51 Atl. Rep. 279.

93. FRAUDS, STATUTE OF—Quantum Meruit.—Oral contract to pay for services rendered, though void under the statute of frauds, held to authorize recovery under a *quantum meruit*. Snyder v. Neal, Mich., 89 N. W. Rep. 588.

94. FRAUDULENT CONVEYANCES—Husband and Wife.—Under Code, § 4226, when a conveyance from a husband to his wife is adjudged void as to his creditors, the effect is to leave the title as to them as though such conveyance had not been made.—Dulion v. Harkness, Miss., 31 South. Rep. 416.

95. HIGHWAYS—Defects.—An allegation that there was a deep ditch close up to a traveled highway, obscured from view by weeds, where the ground gave away under a traction engine, held to show a defect in such highway.—Stauffacher v. Town of Sylvester, Wis., 89 N. W Rep. 495.

96. HOMESTEAD—Fraudulent Conveyance.—Where, after a conveyance of land by a husband to his wife has been adjudged fraudulent as to creditors of the husband, he moves onto the land and makes it his home, he is entitled to homestead rights therein. Dulion v. Harkness, Miss., 31 South. Rep. 416.

97. HOMICIDE Instruction.—An instruction, on a trial for murder, that "a purpose to kill," distinctly formed, is sufficient to constitute the crime, held erroneous, though not ground for reversal.—Lifton v. State, 31 South. Rep. 420.

98. HUSBAND AND WIFE—Liability for Support of Adulterous Wife.—Where a wife has been guilty of adultry, the husband is not bound to support her, and he is not liable to prosecution, under Code, § 970.—State v. Hopkins, N. Car., 40 S. E. Rep. 973.

99. INSURANCE—Effect of New Contract With Employee.—New contract made by employer with employee held to increase employee's responsibilities and to discharge fidelity company from liability on its bond.—Sun Life Ins. Co. v. United States Fidelity & Guaranty Co., N. Car, 40 S. E. Rep. 975.

100 JUDGMENT Res Judicata.—A judgment for an installment of salary after discharge, on the ground that the discharge was wrongful, is *res judicata* on that point, in action for a further installment.—Allen v. International Text Book Co., Pa, 51 Atl. Rep. 323.

101. JUDGMENT—Res Judicata.—A judgment for a portion of a debt is not *res judicata* that the debt is payable in installments, and the debtor, in a suit for the remainder, may set up the defense that the debt was payable in a lump sum, and that plaintiff's claim is barred by splitting his cause of action.—Callan v. Anderson, Ala., 31 South. Rep. 427.

102. JUDGMENT—Res Judicata.—Judgment for the payee in an action on one of two notes held not to estop the maker from setting up, in action on other note, a defense not in issue in the first suit.—Worth v. Carmichael, Ga., 40 S. E. Rep. 797

103. JUDGMENT—Setting Aside.—As condition of setting aside a judgment acquired without lawful service on defendant, the court cannot require him to appear and plead.—Wren v. Johnson, S. Car, 40 S. E. Rep. 987.

104. JUDGMENT—Setting Aside False Judgment.—A trial court, in setting aside a default judgment, may base its action upon matters within its own knowledge.—Foley v Leisy Brewing Co., Iowa, 89 N. W. Rep. 260.

105. JURY Incompetent Jury.—A person who has heard all the facts of a murder from an eyewitness, and has formed a fixed opinion, is incompetent to try the one accused of such murder, even under Code, § 2355.—Shepprie v. State, Miss., 31 South. Rep. 416.

106. JUSTICES OF THE PEACE—Jurisdiction.—Judgment of justice held not void for want of jurisdiction, when rendered within the four days agreed upon by the parties, under Code, § 1002, providing for judgment either at the close of the trial or within four days thereafter, if the justice desires time to consider.—Reed v. Molt, Neb., 89 N. W. Rep. 277.

107. LANDLORD AND TENANT—Severable Contract.—A contract for the rent of a house, containing a condition requiring the landlord to buy furniture on its termination, held a severable contract, which would prevent the tenant, in an action of unlawful detainer, from setting up the landlord's breach as a defense.—Carmack v. Drum, Wash., 67 Pac. Rep. 808.

108. LARCENY—Recent Possession.—The unexplained possession of recently stolen property is *prima facie* evidence of the larceny of the property.—State v. Herron, Kan., 67 Pac. Rep. 861.

109. LIFE INSURANCE—Delay in Action.—Objection to proofs under a life insurance policy held to show no ground for delaying the action more than 90 days after such proof is submitted.—Bankers' Reserve Life Assn. v. Finn, Neb., 89 N. W. Rep. 672.

110. LIMITATION OF ACTIONS—Fraud.—An action to charge defendant for a debt owing plaintiff from one who gave defendant a chattel mortgage to secure a debt on property of more value than his debt is an action for fraud, and barred in two years.—Houghton v. Axelsson, Kan., 67 Pac. Rep. 825.

111. MALICIOUS PROSECUTION—Probable Cause. The question as to what constitutes probable cause is a question for the court, and not the jury.—Bank of Miller v. Richmon, Neb, 89 N. W. Rep. 627.

112. MANDAMUS—Costs in Compelling Court to Sign Bill of Exceptions.—In proceedings to compel the court to settle and sign a bill of exceptions, on judgment for

plaintiff, he may recover attorney's fees and other expenses incurred.—McClure v. Scates, Kan., 67 Pac. Rep. 856.

113. MANDAMUS — Inadequacy of Other Remedies.—*Mandamus* will lie, where relator's right is clear and there is no other adequate remedy.—Edward C. Jones Co. v. Town of Guttenberg. N. J., 51 Atl. Rep. 274.

114. MANDAMUS — Reassessing Personalty — In an action to compel proper officers to reassess personalty which has escaped taxation, the several officers of a city and county may be joined as parties, though duties performed by them are separate acts.—State v. Harbison, Kan., 67 Pac. Rep. 844.

115 MANDAMUS—Review of an Interlocutory Judgment.—*Mandamus* will not lie to review an interlocutory judgment in proceedings to punish a juror for misconduct.—Ponpard v. Frazer, Mich., 89 N. W. Rep. 577.

116. MASTER AND SERVANT—Contract of Employment.—One contracting to work for a corporation for a definite time held not bound to another corporation in which it is merged.—Globe & Rutgers Fire Ins. Co. v. Jones, Mich., 89 N. W. Rep. 580.

117. MASTER AND SERVANT—Employee's Right to Be Fed, Clothed and Sheltered.—In the absence of a contract or established custom, it is not a duty of a railroad company to furnish the employees on its road with food, shelter, or transportation between their homes and places of work.—King v. Interstate Consol. St. Ry. Co., R. I., 51 Atl. Rep. 301.

118. MASTER AND SERVANT — Negligence of Fellow-Servant.—Inspector of electrical apparatus of trolley car, in inspecting it for efficiency, held a fellow-servant of the conductor. Shugard v. Union Traction Co., Pa., 51 Atl Rep. 325.

119. MASTER AND SERVANT — Personal Injury.—An averment in the complaint, in an action for injury to a servant, that the machine was unsafe and wholly unguarded and unprotected, in violation of the statute, is sufficiently specific, and a compliance with Burns' Rev. St. 1901, § 341 — Beuhner Chair Co. v. Feulner, Ind., 68 N. E. Rep. 239.

120. MASTER AND SERVANT—Question for a Jury.—Whether an inexperienced boy 16 years old should have been instructed how to do the work at a feed cutter with safety held a question for the jury.—Ertz v. Pierson, Mich., 89 N. W. Rep. 680

121. MORTGAGES—Appraisal of Real Estate.—One who attacks appraisal of real estate because one appraiser was not a freeholder must establish such fact by a preponderance of the evidence.—Lombard v. Pasusta, Neb., 89 N. W. Rep. 255.

122. MORTGAGES—Appraisement.—After land has been sold on foreclosure, it is too late to question the appraisement, except in case of fraud —Farmers' & Merchants' State Bank v. Thornburg, Neb., 89 N. W. Rep. 626.

123. MORTGAGES—Bona Fide Purchaser.—A purchaser in good faith without notice of an assignment of a mortgage will be protected by a release executed by the original mortgagee.—Cheshire Provident Inst. v. Gibson, Neb., 89 N. W. Rep. 243.

124. MORTGAGES—Estoppel.—A party taking an assignment of a foreclosure decree, and procuring a sale of the property thereunder, held estopped from questioning the regularity of the sale.—Farr v. Lachman Mich., 89 N. W. Rep. 688.

125. MORTGAGES—Foreclosure Sale —A purchaser at a defective foreclosure sale, who has gone into possession by the consent of the mortgagor, and has remained therein until the redemption period has expired, may redeem under Gen. St. 1894, § 6041.—Law v. Citizens' Bank, Minn., 89 N. W. Rep. 320.

126. MORTGAGES—Petition in Foreclosure.—On foreclosure, petition must allege that no proceedings at law have been had for the recovery of debt; and, where the answer is a general denial, the allegation must be proved.—Drury v. Roberts, Neb., 89 N. W. Rep. 600.

127. MORTGAGES — Primary Debtor.—Where land is conveyed subject to a mortgage, it is, as between the grantor and grantee, the primary debtor —McNaughton v. Burke, Neb., 89 N. W. Rep. 274.

128. MORTGAGES—Sale.—The fact that on foreclosure the property sold for more than two-thirds of its appraised value is insufficient to warrant the reversal of the order of confirmation.—Merchant v. Baumeister, Neb., 89 N. W. Rep. 629.

129. MUNICIPAL CORPORATIONS — Amendment to Declaration.—Where a declaration avers that complainant fell over a loose plank on a sidewalk, it is not error to permit an amendment that the plank was a part of the walk.—Brown v. City of Owosso, Mich., 89 N. W. Rep. 568.

130. MUNICIPAL CORPORATIONS—Board of Local Improvements.—Where a majority of the board of local improvements present adopts a resolution for a local improvement, that a member of the board was absent, will not vitiate the proceedings.—Gage v. City of Chicago, Ill., 63 N. E. Rep. 184.

131. MUNICIPAL CORPORATIONS—Bonds for Subcontractors.—Contract for work for city, allowing it to change plans and specifications, held part of bond of contractor for subcontractors, so that surety is not discharged by deviation by subcontractor from his contract, made necessary by the city's changes in specifications.—City of Philadelphia v. Stewart, Pa , 51 Atl. Rep. 348.

132. MUNICIPAL CORPORATIONS—Construction of Sidewalks —Abutting property cannot be assessed under a resolution to construct sidewalks, adopted pursuant to Ann. Code 1892, § 3011, where the resolution states that the council will cause the walks to be constructed, but says nothing as to how they are to be paid for.—City of Greenville v. Harvie, Miss., 31 South. Rep. 425.

133. MUNICIPAL CORPORATIONS—Contract for Lighting.—In an action against a city for compensation for furnishing lights, the company's failure to bury its wires and paint its poles, pertaining only to continuance of its franchise, held no defense. — Kaukauna Electric Light Co. v. City of Kaukauna, Wis., 89 N. W. Rep. 542.

134. MUNICIPAL CORPORATIONS — Defective Sidewalks.—A pedestrian, who falls in a hole in a sidewalk, cannot as a matter of law be held negligent because she was at the time talking to a companion. — Butcher v. City of Philadelphia, Pa., 51 Atl. Rep. 330.

135. MUNICIPAL CORPORATIONS—Defect in Sidewalks.—In an action against a village for defective sidewalk, instruction that it "had notice of the condition of the walk, whatever it was," held justified by the evidence. — Hart v. Village of New Haven, Mich., 89 N. W. Rep. 677.

136. MUNICIPAL CORPORATIONS — Independent Contractor. — Injury held to have been done by an independent contractor, so that the city for whom he was doing the work was not liable. — White v. City of Philadelphia, Pa., 51 Atl. Rep. 332.

137. MUNICIPAL CORPORATIONS — Interest on Bonds.—Interest on town bonds will be allowed at the rate specified, though the legal rate of interest was changed between the issue of the bonds and the time they became due. — Edward C. Jones Co. v. Town of Guttenberg., N. J., 51 Atl Rep. 274.

138. MUNICIPAL CORPORATIONS—Oral Directions Modifying Contract.— Under Act June 1, 1885, recovery on a contract to construct a building for a city for a certain amount, providing that the work to be done under it shall not exceed such amount, cannot exceed such sum, though changes were made on oral direction of the city architect. — McManus v. City of Philadelphia, Pa., 51 Atl. Rep. 320.

139. MUNICIPAL CORPORATIONS — Ordinances as to Laying Gas Pipes. — Under a city ordnance passed pursuant to authority conferred by Comp. Laws, § 7123, a gas company held to have no right to lay

its main pipes in the city streets, as against a requirement of the council that they should be laid in the alleys —Traverse City Gas Co. v City of Traverse City, Mich., 89 N. W. Rep. 574.

140. MUNICIPAL CORPORATIONS — Payment of Claim. — Under Const. art. 11, § 18, and Municipal Act, §§ 766, 786 (Gen. Laws 1899), a city treasurer held to have no right to pay a judgment against a city in full out of a certain fund, to the exclusion of an equally valid claim against such fund which had not been reduced to judgment. — Fresno Canal & Irrigation Co. v. McKenzie, Cal., 67 Pac. Rep. 900.

141. MUNICIPAL CORPORATIONS — Special Improvements.—The terms "special improvements," in a statute or city ordinance, do not of themselves import that the owners of abutting lots shall bear the whole expense of such improvements. — City of Greenville v. Harvie, Miss., 81 South. Rep. 425.

142. MUNICIPAL CORPORATIONS Validity of Statute. — In proceedings to compel delivery of books and papers pertaining to a public office, held proper to determine the question of the validity of the statutes under which the appointment to such office was made.—*In re* Brenner, N. Y., 63 N. E. Rep. 133.

143. NAVIGABLE WATERS — Evidence. — Where a schooner was lost, owing to the failure of a bridge tender to open a draw, and the evidence as to signals is conflicting, the question as to whether signals were given, and could be heard in the storm then raging, are for the jury. — Louisville & N R. Co. v. McDonald, Miss., 31 South. Rep. 418.

144. NEGLIGENCE Dangerous Walls. — The owner of dangerous walls of a burned building is liable for failure to prevent injuries from the wall falling from ordinary causes, or extraordinary causes liable to occur, which liability is not relieved by instructing competent architects and builders to take the proper precautions, which they neglect to do. — Lauer v. Palms, Mich., 89 N. W. Rep. 694.

145. NEW TRIAL – Stipulations.— Stipulation as to time for filing notice of intention to move for new trial and statement on motion therefor held to allow performance of any of the acts within such time. — Walsh v. Wallace, Nev , 67 Pac. Rep. 914.

146. PARTITION Settlement of Estate. — A forced settlement of testator's estate cannot be compelled by partition proceedings within a year of his death.—*In re* Keim's Estate, Pa., 51 Atl. Rep. 337.

147. PARTNERSHIP Evidence.—A new letter head, and a statement that a delay in ordering goods was because of the reorganization, held sufficient notice of a change from a partnership. — Edwards v. Wheeler's Estate, Mich , 89 N. W. Rep. 679.

148. PARTNERSHIP — Evidence. — In an action to recover money alleged to have been loaned to certain persons as co-partners, evidence as to the existence of the partnership relation held sufficient to require submission of that question to the jury. — Merchants' Nat. Bank v. Stebbins, S. Dak., 89 N. W. Rep. 674.

149. PARTNERSHIP – Order of Distribution. — General contract creditors of a contractor held entitled to *pro rata* payment out of the balance of the funds due under the contractor's contract, after payment of those holding priorities. — Willard v. Bullen, Oreg., 67 Pac. Rep. 924.

150. PARTNERSHIP — Silent Partner's Rights.— A silent partner to a bridge construction contract held to have no claim to the funds due the ostensible contractors, as against the creditors of such ostensible contractors. — Willard v. Bullen, Oreg., 67 Pac. Rep. 924.

151. PLEADING — Demurrer.— A demurrer reaches the entire record, and judgment must go against him whose pleading was first defective in substance. — Brown v. Houghton, Neb., 89 N. W Rep. 251.

152 PLEADING—Formal Defects.— Tendering answer, and asking leave to file same, after overruling of demurrer to petition, held a waiver of formal defects in petition and any irregularity in the ruling on demurrer. — Bankers' Reserve Life Assn. v. Finn, Neb., 89 N. W. Rep. 672.

153. PRINCIPAL AND AGENT — Subsequent Ratification. —Where a defective deed was made by an attorney in fact, a subsequent ratification of it relates back to the time of the execution, but not so as to affect the intervening rights of third parties. — Graham v. Williams, Ga., 40 S. E. Rep. 790.

154. PRINCIPAL AND SURETY—Collateral Security. — A security can demand that any securities held by the creditor as collateral should be applied in satisfaction of the debt.- Pierce v. Atwood, Neb., 89 N. W. Rep. 669.

155. PRINCIPAL AND SURETY — Failure to Account. — Where a purchaser of a note constitutes his assignor his agent to collect, and he collects the principal and interest, on failure to account therefor the holder cannot collect a second time from the maker. — Pochin v. Knoebel, Neb., 89 N W. Rep 264.

156. PRINCIPAL AND SURETY — Moneys Deposited. — Where moneys deposited on condition that the creditor can require it to be applied on his claim, and he turns it over without consent of the guarantor, the latter is discharged. — Pierce v. Atwood, Neb , 89 N. W. Rep. 669.

157. QUO WARRANTO— Trustees of Waterworks. — The superintendent of the water system of a city of the first class held to have a sufficient interest entitling him to prosecute an action of *quo warranto*, under Code § 4316, to determine the title of appointees to the office of trustees of the waterworks. — State v. Barker, Iowa, 89 N. W. Rep. 204.

158. RAILROADS—Obstruction of Crossing. — Obstruction of public crossing with cars held *prima facie* negligence. — Todd v. Philadelphia & R. Ry. Co., Pa , 51 Atl. Rep. 332.

159. RAILROADS—Safety at Crossings.— An interlocking system held not necessarily within a contract to bear the expense of watch houses, siginal stations, signals, and "other similar appliances," because its ultimate object is safety at crossings. — Chicago, St. P., M. & O. Ry. Co. v. Chicago, M. & St. P. Ry. Co , Wis., 89 N. W. Rep. 180.

160. RECEIVERS – Negligence.– Judgment for injury to employee though receiver's negligence, he having nothing remaining in his hands, held collectible from those who received benefit of fund bound for expenses of receivership. — Knickerbocker v. Benes, Ill., 63 N. E. Rep. 174.

161. SALES Conditional Sales.—Where the contract of sale showed a reservation of a right to retake possession of the property on default it was in effect a reservation of title in the seller. — Walters v. Americus Jewelry & Music Co., Ga., 40 S. E. Rep. 803.

162. SALES—Damages. — Measure of damages for defendant in quality of lumber furnished under contract held not to include loss of profits. — W. K. Henderson Lumber Co. v. Stilwell & Co., Mich., 89 N. W. Rep. 718.

163. SALES— Payment in Installments. – Where a contract for delivery of iron required payment in installments, a letter, on demand for an installment, refusing payment until part of the balance was delivered, held to justify the seller's rescission.— Johnson Forge Co. v. Leonard, Del., 53 Atl. Rep. 305.

164. SET-OFF AND COUNT RCLAIM Several Liability.— Contract between a corporation and two other parties held not to create a several liability as to the two other parties, so as to entitle the corporation to set-off a claim under the contract against a claim of one of the parties for dividends. — Rumney v. Detroit & M. Cattle Co., Mich., 89 N. W. Rep. 573.

165. SHERIFFS AND CONSTABLES – Action on Bond.—In an action on an indemnity bond given the sheriff before levy, the merits of an action by a claimant of the property, in which judgment was rendered against the sheriff and paid, cannot be inquired into. — Omaha Carpet Co. v. Clapp, Neb., 89 N. W. Rep. 246.

166. SHERIFFS AND CONSTABLES — Excessive Levy. — Where a sheriff, in good faith and not knowing the levy is excessive, levies an execution on a growing crop of peaches by direction of the execution creditor, and is compelled to pay damages because the levy is excessive, he may recover from such creditor, whether an express promise of indemnity is made or not. — Arnold v. Fowler, Md., 51 Atl. Rep. 299.

167. SHERIFFS AND CONSTABLES—Liability on Bond.—That an indemnity bond recites that the officer has been directed to levy on property of the judgment debtor will not prevent a recovery, if he was actually directed to levy on property of a third party.—Benson v. Caulfield, Neb., 89 N. W. Rep. 664.

168. SHERIFFS AND CONSTABLES—Writ of Execution.—In an action against a sheriff for not executing a writ of execution, held, that an order staying execution, not served on the sheriff until after he had failed to execute process, was admissible in his behalf.—Harris v. Snyder, Wis., 89 N. W. Rep. 660.

169. SPECIFIC PERFORMANCE — Indefinite Terms.—Where a contract is so indefinite that specific performance cannot be decreed, equity will not retain jurisdiction for the purpose of awarding damages for a breach which should be recovered at law.—Park v. Minneapolis, St. P. & S. S. M. Ry. Co., Wis., 89 N W. Rep. 532.

170. SPECIFIC PERFORMANCE — Parol Promise.—A parol promise by the owner of real estate to leave his property to one at death, in consideration of money advances, is insufficient to support a suit for specific performance against the estate of the person so promising.—Cochrane v. McEntee, N. J., 51 Atl. Rep 279.

171. STARE DECISIS—Erroneous Construction.—Where statutes are explicit, and their purport is not to be doubted, previous decisions, giving them a wrong construction, made in passing on a question not argued, and overlooking a portion of the statute involved, will not be adhered to.—Remey v. Iowa Cent. Ry. Co., Iowa, 89 N. W. Rep. 218.

172. STATES—Costs Against State.—Judgment for costs cannot be given against the state, without a statute expressly authorizing it.—Sandberg v State, Wis., 89 N. W. Rep. 504.

173. STATUTES — Defective Act.—The incorporation into the Code of 1895 of an act passed previously to that time cures any defect in the original act by reason of its containing matter not expressed in its title, or attempting to amend a section of the Code by reference to the number.—Daniel v. State, Ga., 40 S. E. Rep. 805.

174. STREET RAILROADS—Negligence.—Traveler, driving in close proximity to street railway track, held not bound to constantly look backward to see whether a car is liable to come in collision with him.—Tunison v. Weadock, Mich., 89 N. W Rep. 703.

175. SUBSCRIPTIONS — Conditional Subscription.—Subscriptions to a church building fund, made subsequent to a conditional subscription, held presumed to be made in reliance on the latter subscription, though it was on a separate paper. Waters v. Union Trust Co., Mich., 89 N. W. Rep. 687.

176. SUBSCRIPTIONS Signature.—Where a person, in subscribing money to build a church, signed only his surname, with the addition of the word "family," he bound himself by such adopted signature to the same extent as though he had signed his full name.—Hodges v. Nalty, Wis., 89 N. W. Rep. 535.

177. SUNDAY—Invalidity of Subscriptions.—Under Rev. St. 1878, § 4595, prohibiting any work or business on the first day of the week, "except only works of necessity and charity," a subscription of money to build a church, signed on Sunday, is not invalid.—Hodges v. Nalty, Wis., 89 N. W. Rep. 535.

178. TAXATION—Inheritance Tax. The provision in Laws 1899, ch 355, limiting the taxation of inheritances, gifts, or sales of personal property in contemplation of death to estates of the value of $10,000 or over, is a reasonable exemption law, and not void and an unfair discrimination.—Black v. State, Wis., 89 N. W. Rep. 522.

179. TRIAL—Limiting Time for Argument.—An order of the trial court limiting the time for arguments will not be reviewed, unless they were unduly restricted and the time allotted was consumed. — Schrandt v. Young, Neb., 89 N. W. Rep. 607.

180. TRIAL—Measure of Damages.—The court is not required to set out the measure of damages in any one paragraph of its instructions, it is sufficient if they as a whole correctly state the rule.—Rath v. Rath, Neb., 89 N. W. Rep. 612.

181. TRIAL—View of Premises.—An instruction directing the jury to disregard evidence obtained by a view of the locus *in quo* is erroneous.—City of Lincoln v. Sager, Neb., 89 N. W. Rep. 617.

182. TRUSTEE—Liability for Loss.—A trustee held not liable for loss in investment in mortgages, though the mortgaged property is just outside the state.—*In re* Goudley's Estate, Pa., 51 Atl. Rep. 315

183. TRUSTS Bequests of Income —Profits on sale of securities by trustees, to whom a will gives property to pay the income to certain persons for life, held part of the principal, not income.—*In re* Kemble's Estate, Pa., 51 Atl. Rep 310.

184. WATERS AND WATER COURSES—Contract to Furnish Water.—Where a water company contracted with the town to furnish it with water, and to pay to the town one-half of the net income derived from the sale or lease of power at its dam, it was not necessary that the power leased or sold by the water company should be used at this dam, in order that it should be liable to the town —Inhabitants of Caribou v. Caribou Water Co., Me., 51 Atl. Rep. 287

185. WATERS AND WATER COURSES—Damages —Smallness of the injury will not prevent recovery of nominal damages against one granted right to use waters of a spring for the use of his mill, where he also uses it for domestic purposes.—Woodring v. Hollenback, Pa., 51 Atl. Rep 318.

186. WILLS—Construction — Will providing W, testator's son, shall have possession of certain property during his life, and at his death it shall be sold for benefit of the heirs, held to give W only a life estate.—Abel v. Abel, Pa., 51 Atl Rep 333.

187. WILLS—Conversion.—An equitable conversion is worked by a will directing that the real and personal property be divided into four equal parts, from one of which $85,000 shall be deducted, and empowering the executors to make sales of the real estate; there being little, if any, personalty.—*In re* Keim's Estate, Pa., 51 Atl. Rep. 337.

188 WILLS Election by Widow After Sixteen Years.—A widow held not entitled to elect to take against her husband's will, on the ground of ignorance of the law after accepting for 16 years the third of the income bequeathed her.—*In re* Boileau's Estate, Pa., 51 Atl. Rep 338.

189 WILLS—Testators Name Signed by Another Party.—Where a will is shown to be signed in testator's name by some person other than himself, proponent must show by unequivocal witnesses that deceased directed such person to write his name consciously and explictly and in the free exercise of his faculties.—*In re* McCoy s Will, Neb., 89 N. W. Rep. 665

190. WITNESSES — Contest of Probate.—In contested proceeding for the probate of a will, the heirs at law of the alleged testator are not disqualified as witnesses to transactions and conversations with the decedent.—*In re* McCoy's Will, Neb., 89 N. W Rep. 665.

191. WITNESSES—Sanding Wet Tracks.—Where the complaint is that defendant did not properly sand its tracks, it is proper cross-examination of a witness, testifying that sand boxes had been discontinued on the cars, to show that another system of sanding had been adopted —Smith v. Philadelphia Traction Co., Pa., 51 Atl. Rep. 345.